The
WORLD COURT
at The Hague
STILL STANDS
DEDICATED TO
PEACE, JUSTICE AND LAW

MERICAN BAR ASSOCIATION JOVRNAL

pril 1945

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Contents

In THIS ISSUE

Cover Picture

This issue is dedicated to the cause of peace among nations and especially to The World Court. Few of us have seen the beautiful structure in which it is housed.

Holland has been bombed on all sides. By some miracle the premises of the Permanent Court of International Justice are still intact.

In 1903 Andrew Carnegie donated a sum of one and one-half million dollars for the erection of a "Court-House and Library (Temple of Peace) for the Permanent Court of Arbitration." The building itself is a creation of L. M. Cordonnier, a French architect from Lille. On August 28, 1913, the offices of the Permanent Court of Arbitration were finally opened at the Peace Palace. In November, 1921, the Permanent Court of International Justice was granted a large part of the building. To provide more space for the Court, the Academy of International Law which used a part of the building since 1923 was removed to a separate building, and the Peace Palace itself was remodeled with the financial help of the League of Nations in 1929 and 1932.

The Permanent Court of International Justice has occupied the Palace until July, 1940, when the President and the Registrar of the Court left The Hague for Geneva. The Palace and the archives of the Court are now in the custody of a judge of the Court, of Dutch nationality.

David A. Simmons

Our President has toured the country in behalf of all the interests of the Association. He has been struck by the extraordinary interest of lawyers everywhere in the World Court issue. He believes that the force which is rallying all men of good will around the standard of international justice according to international law is a profoundly deep current that can only be described as spiritual. The President of the Canadian Bar Association was invited and had expected to write for this issue. The pressure of his manifold responsibilities made it, at the last moment, impossible for him. We regret that, but pay tribute to the magnificent work Mr. Brais is accomplishing.

Canadian and American Joint Statement

The Canadian and American Bar Associations have appointed special committees on postwar problems. The two chairmen—Chief Justice Farris and Judge Ransom—have concurred in a joint statement which is one step and a happy augury towards more international cooperation. *This is a factual statement.* Their *reports with recommendations* as to resolutions will be separate documents addressed to the Governing Boards of the two Associations.

"Consensus of the Weights"

At the end of each Regional Group Meeting each man was asked to express himself. He was not bound thereby but after going around the table you could, in the time-honored Quaker fashion, certainly sense and record the "weight."

The "weights" of 25 meetings in North America have been compressed into a consensus. It is the heart of this issue.

Mitchell B. Carroll

The chairman of our Section on International Law told in our March issue of the important work the Section had done up to that time; herein he continues the story. The Section and the Special Committee have worked loyally and along parallel lines. Having consulted the lawyers in different parts of America they find themselves in substantial accord. The one difference is about Regional Courts. That may turn out to be simply a difference in emphasis or of timing.

A Regional Conference

Robert T. McCracken tells about a typical regional group meeting. He writes from the inside because he presided at the Philadelphia session. That night he left for Toronto to tell a meeting of Canadian lawyers about his own experience. His enthusiasm encouraged them in the plans they had already made.

Chief Justice Simmons

Providence is sometimes kind to those who devote the utmost of their heart and soul to a great cause. Out of the blue heaven came this timely article by the Chief Justice of Nebraska. It is a fitting and beautiful conclusion to what we have attempted.

Books for Lawyers

Louis B. Sohn contributes a forthright review of Professor Fleming's caustic book on the World Court. He does not think the author's recriminations are timely or that present agitation for change in the constitutional method of ratifying treaties will aid the early establishment of an adequate international organization.

San Francisco

If our State Department will grant us the permission, for which we have applied, we would like to send a copy of this issue to each representative of all the United Nations.

We believe that this issue contains one of the finest statements about the World Court that can be found anywhere in current print.

We pray that the conclusions herewithin presented may be found acceptable, be enacted, and so become a part of the Great Charter of Human Freedom.

Announcement

TO MEMBERS

The Committee on American Citizenship announces that it will conduct a prize contest for the best Statement of Principles, or Creed, on the following subjects:

1. The Responsibility of the Citizen as a Voter.
2. The Responsibility of the Citizen as a Juror.

There will be three prizes, the first $500.00; the second $250.00; and the third $100.00.

The contest is open to all members of the American Bar Association with the exception of its officers and the members of the Committee on American Citizenship.

Any contestant may write on either one or both topics. His entry on each subject shall be limited to 250 words, typewritten on one sheet of paper.

The Statement of Principles, or Creed, here called for must be prepared for this contest and not previously published. All right, title and interest in those submitted shall belong to the American Bar Association.

The decision as to prize winners will be made by the members of the Committee on American Citizenship, and in case of disagreement the decision of the Chairman of the Committee shall be final. The prizes will be awarded to the three best papers submitted, without regard to the subject chosen.

All papers must be submitted on or before May 15, 1945, and should be addressed as follows:

Committee on American Citizenship,

American Bar Association
1140 North Dearborn Street,
Chicago 10, Illinois

Leadership— A Responsibility of the Bar

by David A. Simmons
PRESIDENT OF THE AMERICAN BAR ASSOCIATION

Beginning April 25 in San Francisco another charter for a world order is to be written. Will the organization be based on force, or on justice and law? Will law replace anarchy in disputes between nations?

The law at any given time is the conception of the people as to the proper rule of conduct. Are we dissatisfied with the conduct of the aggressor nations these last few years? Do we believe some other course of conduct is desirable for future generations? Have we the wit, the capacity, and the courage to formulate a standard of conduct for nations which, if accepted, will be likely to prevent future wars?

Have we progressed to the point as a nation that we are ready and willing to accept our full share of responsibility for world order?

I believe the other nations of the world know we seek no aggrandizement, that we have no ulterior motives, that we are seeking neither offensive nor defensive alliances, and that the only thing we covet is friendly relations with all the nations of the world.

Although we are conscious of our strength, we realize that in these latter times of recurring total war, no nation can stand alone. Neither we nor any other nation can afford to risk another world conflagration. Inventive genius has now placed in the hands of mankind information and devices so formidable that their logical development and complete utilization will bring an end to civilization. If the nations divide and square off at each other once more in hostile rage and fight a total war to the last extremity of bitterness, mankind, stripped and ruined, will sink back into the chaos and oblivion from which it so recently emerged.

Common prudence requires mutual forbearance and indicates the necessity of finding some method of solving disputes between nations in lieu of trial by battle. In individual affairs wager of battle gave way to wager of law because the conscience of man compelled the admission that might does not make right, and that force is not a valid substitute for reason. And so, on justiciable issues, the courts took over; and on political issues the decisions were made by the legislative and by the executive departments of government. The individual was no longer permitted to make decisions and to take individual action which breached the peace of the community.

As the conscience of the individual compelled the substitution of law for force in the settlement of personal disputes, so the collective conscience of mankind must now demand a solution of disputes between nations on the basis of justice and law.

Such a result does not come about from wishful thinking. The responsible officials of the United Nations have taken the preliminary steps and many individuals and organizations have long worked toward that end. Among these are the lawyers.

And well may we believe in equal justice under law, for those who have never believed in equal justice and in liberty under law have never believed in lawyers. Tyrants, ancient and modern, who ignored the law and ruled by fiat, had no need for a group whose life was bound up in the study and interpretation of the law. Those who deal in favors have no love of justice and do not care to be annoyed by those who speak of it as a right.

From ancient times until today, in every country where constitutional government has ever flourished, the men of law have fought to gain and to retain liberty under law. The pages of history record no dictator, oligarchy or aristocracy who had any sympathy for lawyers and their eternal plaint about the common man and his right to life, liberty and the pursuit of happiness. Every movement for liberty in every civilized country has been led by lawyers; every trend toward tyranny has been fought by lawyers; and dictatorship has been attained only when the rights of the people, including freedom of speech, freedom of the press, and the right of counsel, have been denied and suppressed.

If you think that the barons at Runnymede secured Magna Charta from King John, let me remind you that Fitzpeter, the chief justiciar, and Stephen Langton, the law-trained priest, had fought the fight for a decade; and it was Langton, after the death of Fitzpeter, who rallied the barons and made the demand. Nor did he write it in fine print on the back of the parchment, but across its face boldly he wrote a charter

of liberty for men which he forced the reluctant tyrant to sign.

The Bill of Rights, the Declaration of Independence, the Constitution of the United States, and the protocol creating the World Court are title deeds of liberty formulated in large part by lawyers.

If we glance back at these beacons in the past, it is not because we are defeatists and despair of the present, but, like any prudent pilot, that we may have markers for our course to guide us in a line consistent with the experience of the race and congenial to our form of government. Then may we face the future with courage and renewed hope that those of our order may be competent to help solve the critical problems of this age, and may be worthy and prepared to assist in writing the next great charter of liberty and justice for mankind.

The American Bar Association and Peace Proposals

The roll is too long to call the names of those members of the American Bar Association who have labored for world peace based on international law. As soon as it was founded in 1878, the Association promptly established a committee on international law, and that committee continued to exist until it was merged in our Section of International and Comparative Law in 1933. Each year for almost seventy years the Association has dealt with the current problems of our international relations, and on matters like the Permanent Court of Arbitration and the Permanent Court of International Justice it has marched in the vanguard.

Two names stand out in the galaxy of members of the American Bar Association who have participated in these activities. These are the names of David Dudley Field and Elihu Root, who were presidents of the Association, the one in 1889, the other in 1916. Field drafted a code of international law which has had wide acceptance, and it was his influence which led to the formation of the International Law Association. Root's name will forever be connected with the long history of the effort to establish agencies of international justice. No other American has ever labored more fruitfully to that end. Perhaps it cannot be said that the American Bar Association has done everything that was possible; yet we cannot be reproached for a failure to take leadership for the enthronement of law and the preservation of peace.

In recent years timid men have said that the lawyers had enough to do if they restricted their activities to their law practice and assisted in the details of improving court procedure. With that I did not and do not agree. A representative democracy is the most difficult form of government to administer. It cannot be made to work by people who think only of their own interests or even their own business or profession.

The founders of this nation rose above their own problems and above those of their own states and established a workable constitutional government. They did it by blending immutable principles and practical organization. If they had their eyes upon the stars, they had their feet upon the ground. No other combination would have worked. Thank God they did not have their eyes upon the ground. The sordid cynicism of the "practical" politician would have been inadequate to the task. As Washington said, they raised a standard to which the wise and the honest might repair.

But why do I think that the lawyers have a special responsibility about these things? Because the lawyer is the universal citizen. His calling relates to all the affairs of life, and he must know something of all trades, pursuits and vocations. How else can he advise people on their personal, business, and public problems? All men look to him for counsel and entrust to him their lives, their liberty, and their fortune. He gathers his learning from every source, in order that he may acquire wisdom and understanding to assist those people who come to him in distress. Only if he bears this fact in mind will he acquire a just conception of the dignity and importance of his office. It is not a business of traffic and barter, but a great profession, rendering a personal service to the people in time of peace; and in time of war its members serve as statesmen or warriors, as the capacity of the individual and the need of the nation may require.

The Lawyers in the War

Forty thousand lawyers and nine-tenths of the students of all the law schools in the country are in the armed services. Not more than five per cent are doing law work. The others are in every branch of service ashore and afloat. They range from privates to generals and admirals. Twenty-seven thousand more in civil practice have volunteered for the war work committees and are rendering free legal service to the members of the armed services and their dependents. Other thousands are serving on draft boards and in the multitude of war activities in which our country is engaged. The membership of the American Bar Association is the highest in its history. I can say without fear of contradiction that the American lawyer is fully conscious of the challenge of the times and is prepared to meet it.

Last summer just before taking office as President of the Association, I sent a questionnaire to the members of the House of Delegates. Among other policy matters on which I asked their counsel and advice was the following:

> Shall the American Bar Association take a broad view of its obligation of national leadership and speak on legal and governmental subjects of current interest, *or* shall it limit the scope of its activities and resolutions to the practice of law and the procedures incident to judicial and administrative justice?

Eighty-seven per cent voted that the Association should take a broad view of its obligation of national leadership.

Consequently, at the annual meeting in September, I for one was not in the least surprised when the Association, with almost entire

unanimity, resolved in favor of the earliest practicable establishment of a general international security organization, which should be empowered with the use of force where necessary to prevent aggression or acts of war by any nation and to enforce the decisions of the international judiciary.

Nor did it stop with generalities, but advocated the retention of the present Permanent Court of International Justice, a representative Assembly of the nations, and an Executive Council. Special emphasis was given to impartial adjudication and to broadening the jurisdiction and powers of the World Court.

The Dumbarton Oaks Proposals

Shortly thereafter, the Dumbarton Oaks Proposals were made public by the President and the Secretary of State. A committee of our Section of International and Comparative Law immediately arranged a conference with officials of the State Department, at which I was assured that the Government would welcome the assistance of the American Bar Association in carrying a discussion of the Dumbarton Oaks Proposals not only to the bar but to the people, as the State Department felt that the lawyers as a group had not only the capacity but the responsibility of helping to solve this great public problem.

We divided our activities into two phases, the first dealing with the problem of a Permanent Court of International Justice and with the extension of international law, the second with the general outline of a world security organization as envisioned by the Proposals.

The World Court discussions were made a special order of business by our Committee on Organization of the Nations for Peace and Law, of which Judge William L. Ransom of New York is chairman. Round-table discussions were held in eighteen of the largest cities of the country, from Boston to San Francisco, at which we gathered together lawyers and jurists experienced and interested in the history and development of international courts. These discussions were led at our request by Judge Manley O. Hudson of the Permanent Court of International Justice, assisted by his associate, Mr. Louis Sohn.

The general questions raised by the Dumbarton Oaks Proposals were made the special order of business of our Section of International and Comparative Law, of which Mr. Mitchell B. Carroll of New York is chairman. Open meetings were arranged by Mr. Carroll and his section in cooperation with local bar associations in New York, Washington, Cleveland, Detroit, Chicago, St. Louis, Shreveport, and New Orleans. Mr. Green H. Hackworth, Legal Adviser of the State Department, Mr. Durward V. Sandifer, Chief of its Division of International Organization Affairs, and Dr. Clyde Eagleton, Legal Expert on International Organization and Security, were graciously assigned by the State Department to assist in one or more of these meetings. Distinguished speakers from each local association participated in the meetings. These meetings were well received in each city by large and enthusiastic audiences.

In addition, as president of the Association I have discussed the responsibility of the lawyers to participate in these matters in addresses before bar associations in New York, Cleveland, Detroit, Tulsa, Houston, El Paso, Los Angeles, San Francisco, Portland, Seattle, Denver, and New Orleans. The lawyers all over the country sense their responsibility and are keenly aware of the necessity of arriving at some correct conclusion on the great international problems that confront our nation. Our thinking has become basic, and, if I am capable of interpreting their feeling, it is about as follows:

Reigns of terror which have been imposed periodically upon the world by the advocates of force must be eliminated in favor of a universal reign of law, first imposed, and then supported, by those who believe in the rule of reason and liberty under law. We must set up an order under which every nation, no matter how small or weak, may dare to assert its just rights against any other, no matter how great and strong; and provide a forum for the settlement of disputes between nations, and a means of enforcing the decisions of the tribunal.

There were seventy-two political entities holding themselves out as independent nations at the beginning of World War II. Those states ranged in size from Russia's eight million square miles and China's four hundred and sixty million people down to such minutiae as Monaco and Liechtenstein. Their problems vary as widely as their area and population. Each must have the right to seek the solution of its problems in its own way, provided that way does not infringe upon the equal right of others to do the same.

In their internal relationships, whether the people of a nation choose to be ruled by prince or potentate, president or commissar, should be of no particular concern to us, provided they have a constitutional government which maintains law and order at home and observes the obligation of international law abroad.

We must accept our full share of responsibility for the future by joining with all nations peacefully disposed, to make doubly sure not only this time but in the future that all outlaw governments that live by the sword shall perish by the sword.

The renunciation of war as an instrument of national policy must be more than a paper pledge. Those who violated it this time, both individuals and nations, must be adequately punished, in order that others similarly tempted in the time to come may understand that the consequences to them will not be gain and glory but suffering and disaster.

When the military victory has been won, order established, criminals punished, and the powers of government slowly relinquished to men of good will who believe in justice and reason, the problems yet remaining will tax the powers of all.

(Continued on page 213)

Lawyers of the Americas Unite for World Court

With the completion of the twenty-five Regional Group Conferences lately conducted throughout the United States and Canada under the auspices of the American Bar Association and the Canadian Bar Association, the organized lawyers of the Americas — North, Central, and South—have made known their considered and emphatic views—to be in united support of the continuance of the present Permanent Court of International Justice as the principal judicial branch of the new international Organization, with a broadened compulsory jurisdiction over legal disputes between States in matters relating to their respective rights. A like unity of opinion has been manifested in behalf of a broadened scope and authority for international law in the post-war world.

Action to this effect had been taken by the Inter-American Bar Association, representing the organized profession in the many countries, in Mexico City last August, (39 *American Journal of International Law*, 10-11), and by the House of Delegates of the American Bar Association on September 12, 1944 (30 A.B.A.J. 545-547).

The significant story of the increased cooperation which has lately taken place between the Canadian Bar Association and the American Bar Association, as to questions relating to international law and the World Court, is fully told in this issue. It marks a land-mark in the history of the profession of law in the two countries. The Canadian Committee, headed by Chief Justice Wendell B. Farris, of Vancouver, British Columbia, and comprising the former Presidents of the Canadian Bar Association as well as other noted jurists and lawyers, is one of the most distinguished in the history of that Association.

The consensus of opinion obtained from the regional meetings, upon many unanswered questions arising under the Dumbarton Oaks Proposals, should be of interest and immediate usefulness to all who are dealing with the subject. Formal action in behalf of the American Bar Association will take place at the meeting of its Board of Governors in Chicago on April 4-6. There may be joint or parallel action by the two great bar associations in behalf of their common objectives.

Regional Group Conferences in Canada and the United States

The following is a list of the centers in which the Regional Group Conferences were held with their respective dates:

Winnipeg, Manitoba (February 26)
Toronto, Ontario (February 28)
Montreal, Quebec (March 1)
Halifax, Nova Scotia (March 3)
Edmonton, Alberta (March 8)
Vancouver, British Columbia (March 11)
Victoria, British Columbia (March 15)

Boston (December 11)
Chicago (December 28)
Denver (December 30)
Seattle (January 2)
San Francisco (January 5)
Los Angeles (January 6)
Houston (January 11)
New Orleans (January 12)
Atlanta (January 14)
Cleveland (January 19)
St. Louis (January 20)
Philadelphia (February 2)
Pittsburgh (February 5)
Detroit (February 19)
Milwaukee (February 23)
Minneapolis (February 24)
Raleigh (March 6)
Jacksonville (March 7)

The following documents best tell the story of what has taken place:

Joint Statement by the Chairmen of the Two Committees

Alive to the vast significance of the current efforts to organize the Nations for peace and security, the American Bar Association and the Canadian Bar Association each created Special Committees to consider the questions involved, more particularly as they relate to law and the administration of justice among Nations.

When the Dumbarton Oaks Proposals were made public on October 7, 1944, they raised numerous questions as to "an international court of justice" as a part of the new Organization, and as to the role of international law therein; but solutions of them were deferred.

This situation seemed to call for the active interest of members of the profession of law, to develop their considered views and make such suggestions as they could from their experience, for dealing with the questions left open at Dumbarton Oaks.

Instead of having the matters reported on by the Committees in first instance—which would have resulted in recommendations drafted by a few men—the two Associations

coordinated their activities and took the questions out to Regional Group Conferences of lawyers held throughout the United States and Canada.

Twenty-five such Conferences were held—eighteen in the United States and seven in Canada—to formulate the considered opinions of representative lawyers in each region. Through bringing together the views expressed in the many separate meetings, a consensus was obtained on the various questions.

The results are presented in the summaries which accompany this joint statement. It is hoped that they will be informative and useful to the representatives of the Governments charged with the responsibility of finding solutions for the pending problems.

The Present Opportunity

With the effort to create an adequate general international organization so well launched and so generally supported, a decisive moment has arrived in the long history of the movement to establish firmly an international court of justice and a broadened authority for law among the Nations.

It is impossible to envisage an organized world without organized justice. It is difficult to foresee a lasting peace unless the present unity is expanded and made solid, through organizing institutions which will accustom the peoples of all Nations to seek and accept the peaceful determination of controversies by law-governed tribunals.

Yet the Dumbarton Oaks Proposals, in the form in which they were offered for public discussion last October, have aroused concern lest the new international organization be cast in too much of a political rather than a legal mould. The Proposals contemplate *"an* international court of justice" as one of the principal organs of the new Organization, but they leave as unfinished business the many substantial problems involved in an agreement on the Statute of the Court.

Perhaps due to their instructions at the time, the conferees at Dumbarton Oaks concentrated their efforts on outlining an effective plan of international organization for security, but the role of international adjudication as one of the key-stones of peace and law was left for later formulation.

While the Dumbarton Oaks Proposals contain some indications as to the role of a court in the new Organization, they present in the alternative, as to its Statute: (a) The continuance of the existing Statute of the Permanent Court of International Justice (the World Court) with such modifications as may be desirable; or (b) The drafting of a new statute based upon the existing Statute. The lawyers who met in these many conferences saw clearly that there would be a vast difference between these alternatives: The first would keep continuity and save the results of the efforts which have persisted during a century. The second would break the continuity with the past, and might involve reopening difficulties which have been surmounted and striking out along untried lines.

In a time of high mortality among international institutions — when pending official proposals call for supplanting the League of Nations, the International Institute of Agriculture, the Bank for International Settlements, and the Paris Convention on International Aviation—the reference to *"an* international court" and the suggestion that *alternatives* are open as to the Statute have caused concern among those who hope that the new Organization will retain and strengthen the institutions which have been builded with so much effort and have represented measurable progress toward the great objectives. The gains which have come from the long struggle to extend the reach of law in international relations cannot lightly be sacrificed; their preservation should be an active preoccupation of the United Nations in launching the new Organization.

Lawyers and other citizens of the two countries were heartened when, in the Chicago Civil Aviation Agreements drafted and accepted after the Dumbarton Oaks Proposals had been promulgated, the Governments accomplished the inclusion of a specific provision, favored by the representatives of the United States, for the settlement of certain controversies through resort to the existing Permanent Court of International Justice. This parallels the provision in some 350 existing treaties and agreements in force between Nations, obligating them in advance to accept the jurisdiction of the existing Court in the event of disputes—all of which might be endangered through innovation as to the Court and Statute.

A Striking Unity of Considered Views

The twenty-five Regional Group Conferences held throughout the United States and Canada, in December through March, revealed a remarkable agreement in the considered views of more than six hundred judges, teachers and practitioners of law. A most heartening unity was shown to exist among the legal profession in English- and French-speaking North America.

By a great preponderance the opinion was shown to be:

1. That an international Court of Justice should form an integral part of the United Nations Organization.

2. That this Court should be the Permanent Court of International Justice, with such adaptation of its Statute as may be required by the supplanting of the League of Nations.

3. That every effort should be made to extend the compulsory jurisdiction of the Court with reference to legal disputes.

4. That the scope of international law should be broadened, and its authority strengthened, in launching a new general international organization.

A more detailed summary of the combined "weights" of the Conferences follows this statement. The recommendations of the two Committees, upon these and other aspects of the Dumbarton Oaks Proposals, will be made in due course. Although the members of the Committees and both Associations are deeply interested in all phases of the pending Proposals, it has seemed to be advisable to confine the present statement to matters pertaining to the World Court and to international law, on which the considered opinion of the lawyers may be immediately helpful to those dealing with the subject.

WENDELL B. FARRIS
Chairman of the Canadian Bar Association Committee on Legal Problems of International Organization for the Maintenance of Peace.

WILLIAM L. RANSOM
Chairman of the American Bar Association Committee to Report as to Proposals for the Organization of the Nations for Peace and Law.

March 22, 1945

Statement of the Manner in Which the "Weight" of Each Meeting Was Ascertained and the Over-all Consensus Was Compiled

Cooperating in a joint effort, the American and Canadian Bar Associations organized a series of Regional Group Conferences of representative members of the profession, for an intensive study of the legal questions presented by the Dumbarton Oaks Proposals. Eighteen such Conferences were held under the auspices of the American Bar Association, in cities throughout the United States; and seven such Conferences have been held under the auspices of the Canadian Bar Association, in different regions of the Dominion.

Outline of the Plan Followed

An attendance ranging from 25 to 30 lawyers proved to be a practicable group for study and discussion. The attendance was usually within that range and average. The participants were in each instance selected by the local conveners, who had been designated by the respective Committees. Each participant was supplied in advance with a documentation of the matters to be discussed. With one exception, a whole day was devoted to each Conference. In some instances, preliminary sessions for study and discussion had been held.

The questions which were submitted in relation to the Dumbarton Oaks Proposals had been drafted after wide consultation with men of both official and unofficial status. They became the agenda of each of the Regional Group Conferences, with special formulations added in Canada, in the light of its situation and experience.

The discussion at all of the American Conferences, and at three of the Canadian Conferences, was led by Judge Manley O. Hudson, Judge of the Permanent Court of International Justice, who was accompanied by his collaborator, Mr. Louis B. Sohn. At the request of the Canadian Committee, a representative of the American Bar Association Committee was present at all but one of the Conferences in Canada.

The "Weight" of Each Meeting

Following extended general discussion, the questions were taken up *seriatim* and the views of those present were ascertained by going around the table and giving everyone present an opportunity to express his views.

The prevailing views were recorded at the time, and the record was checked with the conveners and usually with others present. Individual views or votes were not recorded. It was made clear that no one need feel bound by the views which he expressed. On questions on which there was a substantial division, no "weight" of that meeting was recorded. As the Conferences were held at intervals over a period of about three months, the "weights" may have reflected to some extent the progress in the public discussions of the Dumbarton Oaks Proposals.

With one or two exceptions, no Conference had before it the "weights" of any other Conference, until after the views in that group had been expressed.

Variances of view there were, of course, within the groups and between some of them, in the meetings held in widely separated parts of the two countries. Significant variances or minority views are noted in the summaries. Taken as a whole, the recorded "weights" of the twenty-five Conferences showed a striking unity in the views, when they were combined into the consensus which follows, in the form of summaries as to the specific questions considered.

Summary of Specific Conclusions of the Regional Groups

1. Importance of an International Court of Justice

Every Regional Group, in the United States and Canada, was of the opinion that an International Court of Justice is greatly needed, and that it should constitute the judicial organ of the United Nations Organization. No exception was taken to the characterization of the Court as "the *principal* judicial organ of the Organization" (Dumbarton Oaks Proposals, Chapter VII, Par. 1). Yet the need for such a court is so imperative and the task of placing the Court on a firm and solid basis is so great that none of the Regional Groups favored undertaking at this time the creation of additional or subordinate judicial tribunals.

2. The Statute as a Part of the Charter

All Regional Groups approved the provisions in the Dumbarton Oaks Proposals (Chapter VII, Par. 2) that the Statute of the Court "should be annexed to and be a part of the Charter of the Organization." Though it was appreciated that an independent statute might have some advantages and a minority view in some groups was not averse to this, the opinion prevailing in all groups was that an international court will be more useful if it has the active and continuous support of the general Organization and that this result may be better assured if the Court is integrated with other institutions of the Organization as contemplated in Chapter IV of the Dumbarton Oaks Proposals. The judicial independence of the Court as a coordinate branch can be assured, it was generally believed, without separating the Statute from the Charter. An international court cannot function in a vacuum, and its fortunes will necessarily be tied in with those of the general Organization. Integration would seem to be more consistent, also, if the election of the judges, the financial maintenance of the Court, etc., are to be provided for within the frame-work of the Organization.

3. Retention of the Present Statute with Modifications

The Regional Groups expressed a decided preference for the *first* of the two alternatives which are stated in Paragraph 3 of Chapter VII of the Dumbarton Oaks Proposals. The consensus was strongly—in most of the groups unanimous—that the Statute of the Court should be "(a) the Statute of the Permanent Court of International Justice continued in force with such modifications as may be desirable," rather than "(b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis."

Many of the American groups added that "fully appreciating the importance of agreement with other Governments, the group ventures to express the hope that the full influence of the Government of the United States will be exercised in favor of continuing the existing Court." Nine of the American groups said, however, that "if the choice had to be between no court and alternative (b), the latter should be accepted." In at least one Canadian meeting in March, those present felt preponderantly that with their then hopeful outlook, they were not greatly concerned with the mechanics of the situation as between (a) and (b), above, *provided* that continuity with the past is maintained, at least the existing jurisdiction of the Court is continued, and existing rights and obligations under treaties are preserved.

4. Reasons for Retaining the Statute

The Regional Groups (with the one exception) were of the opinion that vastly different consequences would flow from the decision as to which of the two courses suggested as to the Statute would be followed; and they were moved to favor the retention of the present Statute because of considerations which are summarized as follows:

(a) When agreement was achieved on the Statute of the existing Court on December 16, 1920, many years of continuous effort came to fruition. The achievement was the more notable because of the lamentable failure at The Hague in 1907. The Protocol to which the Statute was annexed has been signed and ratified by fifty-one States of the world; and almost all of the States now existing—in fact all except Nepal, Saudi Arabia, Vatican City State, and Yemen—have become parties to international instruments which confer jurisdiction on or otherwise relate to the existing Court. Several hundreds of such instruments continue to be in force despite the war. Some of these instruments are of recent date; e.g., the Chicago Civil Aviation Agreements, which were drafted and promulgated after the issuance of the Dumbarton Oaks Proposals on October 7, 1944. The preservation of this vast body of conventional law—a generation of effort would be required for its reconstruction if it were abolished—would seem to be a desideratum of first importance, and this is possible only if continuity is maintained. A "new Statute" would jeopardize, even if it did not interrupt, the continuity.

(b) The Statute of the existing Court supplies solutions, which on the whole are quite satisfactory,

of issues debated over many decades. The preparation of a "new statute" might reopen many of these issues, and there can be no guarantee that new solutions given to them would be as satisfactory or as generally acceptable.

(c) The existing Permanent Court of International Justice has accumulated a valuable experience under the existing Statute. The Court functioned with astonishing success over a period of eighteen years—from 1922 to 1940. Sixty-five cases came before it during this period, and the Court's handling of them produced a general satisfaction throughout the world. Such criticism as took place concerning its judgments and opinions was not more than that which may be expected as to any like public institution. In no case did a litigant State offer objection to the procedure followed. Advantage of the accumulated experience will, it was thought by the groups, be assured better by continuing in force the existing Statute to which the precedents relate than by launching a new statute.

(d) The Court is in its twenty-third year, and is in a position to resume its activity if and when the world situation will permit. Its premises in the Peace Palace at The Hague are intact; its President and Registrar carry on their duties from Geneva; its budget for 1944 was duly alimented, and a budget for 1945 has been adopted. The twelve judges who continue in office are available for the discharge of their functions until their successors are chosen.

(e) Participants in the Regional Groups were cognizant, however, that the continuance of the existing Statute with necessary modifications, and the retention of the existing Court as an institution, do not involve the continuance of the present membership of the Court. There are three vacancies in the Court. The normal terms of all members expired in 1939; they remain in office under a provision in the Statute that "they shall continue to discharge their duties until their places have been filled." New nominations and elections for all places will in any event be required. Whether or not the existing Statute and the Court as an institution are retained, the United Nations Organization will start with a free hand in the selection of the judges.

5. Modifications of the Existing Statute

Each of the Regional Groups studied and discussed in considerable detail "such modifications as may be desirable" (Dumbarton Oaks Proposals, Chapter VII, Par. 3) if the Governments decide to continue in force the Statute of the Permanent Court of International Justice. It was felt that these particularly are questions on which the judgment and experience of the jurists, teachers and practitioners participating in the conferences may be useful to those dealing with the subject.

It was recognized that some modifications of the Statute will be necessary if the League of Nations is supplanted by a New Organization; e.g., the substitution, in appropriate places, of references to the United Nations Organization, its General Assembly, and its Security Council. The Regional Groups were each of the view, with virtual unanimity, that "desirable", as distinguished from necessary, modifications should at present be kept at the minimum. Specifically, the considered judgment of the Regional Groups is stated further in the paragraphs following.

6. Nomination and Election of Judges

The conclusion was general, throughout the Regional Groups, that no changes should be made in the present system of selecting the judges of the Court. The method of nominating candidates in the elections has worked well and has produced generally satisfactory results. It has the advantages that it avoids premature commitments by Governments, and that it accords to national groups in each country the privilege of expressing preferences as to candidates from other countries. The conduct of the elections by the Assembly and Council of the League of Nations, with the collaboration of representatives of parties to the Statute which were not members of the League of Nations, has worked smoothly on eleven occasions. It should be continued, with the substitution of the General Assembly for the League Assembly and of the Security Council for the League Council, the two electoral bodies to continue the practice of meeting and voting separately but at the same time.

The consensus was strongly to the effect that the judges should continue to be without representative character in the sense that they should not be regarded as representatives of the States whose nationality they possess. This was one of the more important of the gains registered in 1920.

Some of the groups considered the advisability of fixing a maximum age of eligibility for nomination and election to the Court, and perhaps an age for compulsory retirement of the judges; but the view usually prevailing was that rigid provisions on these matters might unduly restrict the discretion of electors and prevent the choice of some highly desirable jurists.

7. Continuance of Advisory Opinions

The Regional Groups came definitely to the conclusion that advisory opinions should be continued, and that the term "advice" used in Paragraph 6 of Section A of Chapter VIII of the Dumbarton Oaks Proposals should not be substituted for the term "advisory opinion", which is employed in the present Statute. The opinion was that both the General Assembly and the Security Council should be empowered to request advisory opinions from the Court, and that other agencies or bodies desiring to do so should proceed through one of these two channels.

From thorough discussion, the view strongly prevailing was that requests for an advisory opinion should be authorized with reference to *any legal question*, but that the Court should remain free to decline to give such an opinion if it deems that course to be necessary. Some of the Regional Groups considered also the nature of the vote to be required for adopting a request for an advisory opinion, but this point was usually thought to depend upon more general decisions as to voting.

8. Regional and Special Chambers of the Court

The Regional Groups approved without exception a current proposal that the Court should be given power to create regional or special chambers as need may be shown to exist, such chambers to hear and decide cases where the parties consent. Accessibility of the Court and the convenience of litigants were stressed by some members of the groups. The Court's Chamber for Summary Procedure has given two judgments, but its Chamber for labor cases and its Chamber for communications and transit cases have never been called upon to function. The experience would seem to indicate that it may not be possible to foresee the precise type of Chamber which may be needed, and the decision may best be left to the power of the Court itself. The possibility of regional Chambers might facilitate States' access to the Court, since a Chamber could meet in any part of the world more readily than could the Court *en banc*. Yet the need for such a Chamber should depend on the desires of the States in the region, and it should be left to the Court to evaluate and act on any such desires as may be expressed.

9. Amendment of the Statute

Most of the Regional Groups—not all of them considered this subject—expressed the view that the Statute should provide the method for its own amendment, and that a procedure of amendment should be adopted which would not require the consent of all of the parties to the Statute, except possibly an amendment to extend compulsory jurisdiction. The opinion was expressed and favored in some of the groups that procedure for amending the Statute might be worked out so as to parallel generally the method of amendment which is decided on as to the Charter.

10. Other Provisions Desirable for Retention in a New Statute

None of the Regional Groups expressed dissatisfaction with the present Statute of the Court in regard to such matters as the Court's name, its seat, the number and qualifications of judges, and the procedure prescribed.

The various Regional Groups studied in some detail the special features of the existing Statute which ought to be retained, even if the Governments should decide to undertake the preparation of a new Statute. With general agreement it was thought that, in addition to the matters already discussed above, the following should in either event be stressed:

(a) Access to the Court—as distinguished from jurisdiction—should continue to be open to all States, whether or not they are members of the new Organization and whether or not they are parties to the Court's Statute. In advisory proceedings, public and private international organizations should continue to be permitted to appear for the purpose of supplying information.

(b) A party before the Court should continue to be entitled to select a judge *ad hoc* when the elected judges include no person of its nationality. In view of the experience of a century and a half, it was deemed doubtful whether a Statute would be generally acceptable without such a provision. Moreover, the presence of judges *ad hoc* may tend to facilitate the deliberations of the Court, and may better assure the acceptance, by States and their peoples, of judgments adverse to their contentions.

(c) Judges of the Court should continue, in the view of all Regional Groups in the United States, to be permitted to express their individual opinions, in dissent or in concurrence. These Regional Groups did not fear that the authority of the Court's judgments would be weakened by dissenting opinions. In some of the groups in Canada, there was a strong minority view in opposition to giving sanction for dissenting opinions.

(d) No change should be made in the Statute's provision for meeting the Court's expenses, beyond that they should be borne by the new Organization instead of the League of Nations.

11. Broadened Jurisdiction for the Court

The Regional Groups without exception concerned themselves actively with questions as to the jurisdiction of the Court and the practicable ways of strengthening and broadening it. The consensus in all groups was that in implementing Chapter VII of the Dumbarton Oaks Proposals, the optional provision for compulsory jurisdiction, as embodied in Article 36 of the Statute of the Permanent Court of International Justice, should as a minimum be fully maintained; and most of the groups expressed themselves most earnestly that ways of extending the jurisdiction of the Court should also be explored and found. Some of the groups in the United States added their belief that their country should, at the least, make a declaration, under the optional clause, accepting compulsory jurisdiction over all legal disputes. The Dominion of Canada took that action fifteen years ago.

Retention of the optional provision in Article 36 would make possible further extensions of the Court's compulsory jurisdiction from time to time, through new declara-

tions and agreements which may be made, or through broadening of some of those which are now in force between Nations. Almost all of the Regional Groups came to the conviction, however, that the revitalizing of international law requires a present advance beyond the optional clause in the present Statute. While the participants appreciated the extent of the departure which this might involve for some States, they felt strongly that after a second World War within a generation, the world is prepared now to go further than was thought practicable in 1920. Since the failure to adopt the recommendation of a compulsory jurisdiction advanced by the Committee of Jurists which drafted the Statute of the Permanent Court of International Justice, forty-five of the fifty-one States which ratified the Statute have made declarations accepting the compulsory jurisdiction described in its Article 36. Some of the declarations were for limited periods of time, and some were subject to reservations. The declarations of twenty-seven States are now in force. In a number of cases, the Permanent Court of International Justice exercised, with no untoward results, the obligatory jurisdiction thus conferred.

In view of this progress since 1920, a large majority of the Regional Groups expressed the hope that all of the States parties to the Court Statute, or at least all of the States which are parties to the Charter, will confer on the Court jurisdiction over their legal disputes, to be exercisable on the application of any party to the dispute. Some of the Regional Groups suggested the desirability of limiting such jurisdiction to future disputes with respect to situations or facts arising in the future.

12. Definition of Classes of Legal Disputes

The Regional Groups generally thought it desirable to maintain the provision in Article 36 of the Statute of the Permanent Court of International Justice which defines the classes of legal disputes to which the compulsory jurisdiction which may be conferred would be applicable. It was recognized, however, that this definition furnishes no test of adjudicability; it merely delimits the conferred jurisdiction. Although the experience to date has not been extensive, it has seemed to indicate that the definition is not unsatisfactory for that purpose. The groups foresaw that the functioning of the new Organization and the Court, and the making of new agreements between the Nations, would operate to broaden the category of "legal disputes", even as thus far defined.

13. Determination of the Existence of Aggression

The Regional Groups which considered the subject were nearly unanimous in a present view that in the existing state of international law "the determination of the existence of aggression is a political question", and that "the Court should not be given any role in that determination, except where the Security Council requests an advisory opinion on a legal question connected with such a determination."

14. Disputes Arising Out of "Domestic Matters"

Most of the Regional Groups which took a "weight" on the subject expressed the view that the exception of disputes arising out of "domestic matters", as contained in Paragraph 7 of Section A of Chapter VIII of the Dumbarton Oaks Proposals, is not sufficiently limited. The exception made in the Covenant was only of disputes "found by the Council to arise" out of domestic matters. When an exception of domestic matters was made by Canada and other States in declarations under Article 36 of the Statute of the Permanent Court of International Justice, it was subject to application by the Court. The consensus was that the Dumbarton Oaks Proposals will be strengthened if the exception can be made applicable only to action by the Security Council, and if it can be limited to disputes found by the Security Council to arise out of domestic matters.

15. Enforcement of Court Judgments

The Regional Groups were unanimously of the opinion that the Charter should contain a provision looking toward the enforcement of judgments of the Court, if compliance were refused or withheld. It was recognized that the Court's judicial function would be exhausted with its rendition of a judgment; enforcement of the judgment raises questions which properly fall within the competence of a body such as the Security Council. States have habitually accepted and complied with the judgments of international tribunals, and it was deemed to be reassuring that no judgment of the Permanent Court of International Justice has ever been flouted. Yet a few instances of non-compliance with arbitral awards have arisen in the past; in the future, a similar non-compliance with judgments of the Court might have the effect of undermining confidence in the processes of law and order.

The consensus was that the Charter might well contain a provision, modeled on that in Article 13 of the Covenant, that the Security Council be empowered, in the event of any failure by a State to carry out a judgment of the Court, to make recommendations or decide upon the measures to be taken to give effect to the judgment.

An earnest belief was voiced in many of the groups, made definite in a "weight" taken in one group (Denver) upon its initiative, that "if the habit of compliance with the mandates of an international court can once be established, most of the obstacles to an international organization along the general lines of the Dumbarton Oaks Proposals will in time disappear or take care of themselves."

16. Parties to the Statute

The Regional Groups which gave specific attention to the problems as to the States which should be permitted to be parties to the Statute of the Court were disposed to welcome the indication, in Paragraph 5 of Chapter VII of the Dumbarton Oaks Proposals, that membership in the new Organization will not be a condition precedent to a State's joining in the maintenance and support of the Court. It was recognized that if the Governments decide to continue in force the Statute of the Permanent Court of International Justice, a problem may arise with reference to some of the States which are now parties to the Statute but which may not enter the new Organization.

With reference to States such as Portugal and Sweden and Switzerland, it was deemed to be improbable that there would be a desire to set significant conditions to their continuing to be parties to the Statute, and the Regional Groups were generally of the opinion that the provisions as to conditions (Dumbarton Oaks Proposals, Chapter VII, Par. 5) should not apply to their relationship to the Court.

With reference to States such as Germany and Japan, the majority opinion in some of the groups favored the application of that paragraph as to conditions. Other groups took the view that universality of submission to the Court is such a desirable goal that no special conditions should be applicable to the support of the Court by these States. The opinion in the groups in the United States divided on this issue more than on any other; in some instances, no "weight" was ascertainable.

Whether the existing Statute is continued in force or a new statute is adopted, a problem may also arise with reference to States which may be expelled from the Organization under the provision in Paragraph 3 of Section B of Chapter V of the Dumbarton Oaks Proposals. Some of the Regional Groups which considered the question—not all of them did—favored the application to such States of the provision for conditions as stated in Paragraph 5 of Chapter VII. Some of the Regional Groups did not favor the idea of expulsion from the Court, and some did not favor the application of conditions in any event.

Responsive to the opinion in the group meetings under its auspices, the general Committee in Canada felt that if the idea of expulsion from the Organization is accepted, a Nation so expelled should nevertheless be subject to and bound by the rulings of the Court.

17. Permanent Court of Arbitration

The Regional Groups in Canada were generally of the opinion that the Permanent Court of Arbitration should be continued in being, and that the Hague Conventions on Pacific Settlement should be amended to facilitate accession by States such as Canada which are not now parties to either of the Conventions. It was thought that this course would be in line with the emphasis, in Section A of Chapter VIII of the Dumbarton Oaks Proposals, on means of settlement of the parties' own choice, and that its adoption would be proper in continuing the present method of nominating candidates in the elections of judges of the Court. The groups in the United States did not directly consider these questions, except as they favored the continuance of the present method of nominating judges.

18. The Scope of International Law

The Regional Groups were generally of the opinion that both the scope and the authority of international law need to be broadened. Some of the disputes which are now regarded as non-legal and non-adjudicable should be brought within the reach of law and within the ambit of the judicial process. This emphasis was particularly manifest in the Regional Group meetings in Canada, which were disposed to stress the importance of international legislation through multipartite conventions. All of the Regional Groups looked forward to a significant extension of international law as resulting from the cumulation of the jurisprudence of a functioning Court.

In general, also, the Regional Groups were of the opinion that the authority of international law will be strengthened if prominent emphasis is given to the concepts of law and justice in the Charter of the new Organization; and in this connection the hope was expressed that the Charter will make specific provision for continuous attention to be given to the place and role of law in an organized world.

Midwest Bar Conferences Support Dumbarton Oaks Proposals

by Mitchell B. Carroll

CHAIRMAN, SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Continuing the program of open discussions among lawyers on the Dumbarton Oaks Proposals begun in New York and Washington (see the JOURNAL for March, 1945, p. 124), Hon. Clyde Eagleton, Legal Expert on International Organization and Security, Department of State, and I, as Chairman of the Section of International and Comparative Law of the Association, encountered only enthusiastic support for the proposed world Organization in Cleveland on February 19, Detroit on the 20th, Chicago the 21st, St. Louis the 23rd, Shreveport the 26th, and New Orleans the 27th. Not only were the Section Recommendations, which had been adopted in Washington on January 27, generally endorsed with only minor exceptions, but a number of the leaders of the various associations urged still further strengthening of the proposed Organization. Resulting action of the local associations was communicated to Secretary of State Stettinius and President Simmons.

Sentiment in some of the other cities as well as in New Orleans is well expressed in the resolutions adopted unanimously by the New Orleans Bar Association at a meeting attended by President Simmons as principal speaker, as well as by the Section Chairman, on March 19. The more important of these resolutions read:

BE IT RESOLVED, That the membership of this Association hereby endorses and approves, in principle, the general plan presented by the Dumbarton Oaks Proposals, as they may be influenced by the Act of Chapultepec, and expresses the hope that there may be further successful progress of a pact for world peace at the forthcoming meeting in San Francisco in April, 1945; and

BE IT FURTHER RESOLVED, That this Association does hereby make specific suggestion of the following several points, as representing the best considered thought of the membership of this Association, upon certain details of the general plan aforesaid:

1. That this Association does approve in principle the recommendations of the Section of International and Comparative Law of the American Bar Association, as adopted January 27, 1945, at Washington, D. C.

2. That this Association does regret and deplore the so-called Yalta Compromise, which provides that in the Security Council any one of the Big Five Nations may exercise the power of veto upon any forcible action against itself; that this Association feels that such stipulation, or compromise, violates the fundamental concept of human justice that an accused party, if adjudged guilty, cannot prohibit action for his own punishment or restraint; that such an inequitable and special privilege in the Security Council in favor of the larger Nations will have a discouraging effect upon participation in the peace pact by the smaller Nations, who are denied such power of veto in their own behalf; that, however, this Association nevertheless favors the alternative proposition that, if any other great power demands and is accorded such power of veto, the sovereignty of the United States necessitates equal extension of the same privilege in the pact to our own government.

3. That the Charter of the proposed Organization should provide that each Nation which is a member of the Organization shall pledge all its economic and military resources for the prevention of aggression against any member of the Organization, and that all members shall commit themselves to enter into an agreement immediately upon the conclusion of the treaty incorporating the Charter of the proposed Organization or, if possible, coincidentally therewith, to agree upon the national contingents necessary to make this pledge effective. To this end the Congress of the United States should enact appropriate constitutional legislation authorizing the use of such forces as are pledged on behalf of this country.

4. That said legislation shall set forth the conditions under which the President of the United States may, through his appointee representing the United States on the Security Council, participate in a vote to utilize such forces for the prevention of aggression.

5. That in order to facilitate the prompt and continuous implementation of the decisions of the Security Council and the recommendations of the Assembly, said legislation shall provide that the representatives of the President on the Security Council and the General Assembly shall,

in each case, be accompanied in an advisory capacity only, by two Senators and two Representatives, representing the majority and the principal minority party in each House of Congress and duly elected by a majority vote of the respective House of Congress.

6. That the principle of mutually guaranteeing territorial integrity adopted by the twenty American Republics at the conference held in Mexico City in March, 1945, be incorporated in the Charter of the proposed Organization so as to be generally applicable throughout the world, but that the Charter should also specifically envisage the possibility of adjustment of frontiers, which may in the course of time become the subject of a dispute, by some process of peaceful settlement.

7. That any action taken by the Security Council to prevent aggression shall not be regarded as war but as the legitimate exercise of police power jointly by the member Nations, and that resistance against this exercise of police power shall be regarded as an offense against the Community of Nations.

Leading Lawyers Active In Meetings

In each city, the presidents of the local associations and prominent lawyers participated in the meetings. Unfortunately space is lacking to name them all, but mention will at least be made of those who took an especially active part in the meetings. In Cleveland, the President of the Association, John T. Scott, opened the late afternoon and dinner meeting, and turned it over to J. C. Hostetler, who presided. Judge Robert N. Wilkin stressed the importance of continuing the Permanent Court of International Justice, and both Frank Quail and Homer Johnson urged that the Organization be given more power than contemplated, such as a limited degree of legislative power. Howard L. Barkdull, of the Board of Governors of the American Bar Association, and H. Austin Hauxhurst, member of the House of Delegates, heartily concurred in the proposals.

The Detroit evening meeting, of over seven hundred and fifty, was presided over by Gerald E. Schroeder, and the President of the Detroit Bar Association, William C. Allee, as a panel member, reviewed the history of the International Court of Justice. George E. Brand, of the House of Delegates, attended. Other panel members representing lay organizations were George Baker, Harry M. Robbins, Mrs. Orville J. Bond, Prof. Preston Slosson, and George Dean.

The Chicago meeting was attended by outstanding lawyers, including President Simmons, Stephen E. Hurley, Tappan Gregory, Chairman of the House of Delegates, Floyd E. Thompson and Edgar B. Tolman. Charles P. Megan presided and C. O. Loucks and Henry C. Morris were among the participants.

Guy Thompson, a former President of the American Bar Association, was primarily responsible for arranging the St. Louis dinner meeting. Forrest M. Hemker, president of the local association, served as chairman, and the eloquent members of the panel included R. Walston Chubb, who spoke in favor of regarding action by the Security Council not as war but as policing, Joseph F. Holland, Samuel H. Liberman, and George C. Willson. Jacob M. Lashly, also a former President of the American Bar Association, served on the arrangements committee.

Pike Hall, Louisiana State delegate, presided over the Shreveport meetings, which included an afternoon session attended by most of the judges and lawyers not in military service, and an evening meeting of over seven hundred and fifty, to which the public was invited. The president of the Shreveport Bar Association, Albert P. Garland, acted as chairman of the committee on arrangements, and the galaxy of past presidents who spoke at the evening meeting included A. M. Pyburn, chairman, Sidney L. Herold, Pike Hall, W. Scott Wilkinson, Joseph H. Jackson, and H. B. Barret.

Herve Racivitch, President of the New Orleans Bar Association, opened the late afternoon and evening sessions, and Leon Sarpy, chairman of the committee on arrangements, presided. The panel members included Charles E. Dunbar, Jr., chairman, who also served as chairman of the special resolutions committee, Oliver P. Carriere, Mrs. Harriet Daggett, J. S. Morrison, and Charles J. Rivet.

General Plan of Meetings

Although each of the meetings was different in character, the general plan was much the same. A foundation was laid by the section chairman who recalled the various American ideas and principles that in 1919 had been incorporated in the Covenant of the League of Nations and are again reflected in the Proposals. He described the procedure in the League Covenant for the peaceful settlement of international disputes, and the lessons to be learned therefrom. Dr. Eagleton showed how the conferees at Dumbarton Oaks had attempted to design a more effective procedure and described the Proposals in general.

With President Simmons' authorization, the Section chairman generally launched the discussion by summarizing the Section recommendations that were to have been presented to the House of Delegates on March 5 and 6. Panel members discussed these recommendations, or certain aspects of the Proposals, and some made exceedingly constructive suggestions which went much farther than the Proposals. Written questions were collected from the audience. Dr. Eagleton, and at times the Section chairman, then answered the questions presented.

Such interest was evoked that in Cleveland, Detroit, and Chicago appropriate committees subsequently examined the Section recommendations, generally approved them and in some cases adopted resolutions of their own. In St. Louis, a committee which first studied the Section recommendations, offered resolutions which were unanimously car-

ried, approving them in principle, except that they felt there was no objection if judges on the World Court had the same nationality as a party to a dispute, and instructing the president so to advise Secretary of State Stettinius and President Simmons. Similar resolutions, without exceptions, were voted in Shreveport and New Orleans and, in the last mentioned city, a special committee was appointed to formulate the previously cited additional resolutions for adoption by the local association.

American Ideas in League And Proposals

All the meetings showed great interest in the results of twenty-five years of experience in world organization in the form of the League of Nations, and the reason for its breakdown as an instrumentality for the maintenance of peace, although its technical activities are still carried on and its members are for the most part included among the United Nations.

The survey of lawyers' opinion in the central part of the United States started very appropriately in Cleveland, because in this city on May 12, 1915, before the World Court Congress, former President Taft offered the first American program for a "League of Peace" with four requisites: First, a court to decide justiciable questions, which was realized in the Permanent Court of Infernational Justice; secondly, a commission of conciliation for non-justiciable questions which took form in the League Council, and its proposed successor is the Security Council; thirdly, recurring conferences to develop international law, which foreshadowed the drafting of conventions by the League Assembly with the help of technical committees, and can be further realized by the General Assembly of the new Organization; and fourthly, the principle that if a member makes war against another, without first trying a peaceful solution, then the other members agree to join in the forcible defense of the attacked member, which was embodied in Article 16 of the League Covenant, the Proposals, and the Act of Chapultepec of March 3, 1945.

Likewise, in framing the covenant, account was taken of American criticisms, in the hope of securing Senate approval. Unquestionably the principal advocates of the League were President Wilson and Lord Robert Cecil of England.

League Procedure for Maintaining Peace

The procedure for maintaining peace set forth in the League Covenant was up to a certain point much the same as that envisaged in the Proposals, and it worked in the early years of the League when disputants were small powers like Greece and Bulgaria whose threatened war in 1925 was successfully averted by the Council through promptly naming a commission of inquiry to go to the scene of trouble, and through exercising its conciliatory functions.

The procedure was based on the recognition in Article 11 that any threat of war was a matter of concern to the whole League and the Council could be summoned to take appropriate action.

The members agreed in Article 12 to submit any dispute which might lead to a rupture either to arbitration or judicial settlement or to inquiry by the Council, and they further agreed not to resort to war until after a "cooling-off period" of three months following the action taken. The competent judicial tribunal was the Permanent Court of International Justice or any other agreed tribunal. Members agreed to carry out in good faith any decision and not to resort to war against the complying member. If a member failed to comply, the Council was to propose steps necessary to give effect thereto.

If a serious dispute was not submitted to peaceful settlement, the parties agreed to refer it to the Council for investigation. The parties had to submit full statements of their case and to authorize publication. If this Council failed to settle this dispute, public opinion was invoked by publication of the Council's report and recommendations.

Unless otherwise provided, the Council had to follow the rule of unanimity. If the Council's report was unanimously approved by the members other than the representatives of one or more disputants, the League members agreed not to go to war with any member which complied with the recommendations, but undertook no obligation to go to war against the non-complying party. If the Council's report was not so approved, then the members reserved the right to take such action as they individually considered necessary to maintain right and justice.

A dispute could be referred to the Assembly by the Council itself, or at the request of either party within fourteen days after submission to the Council, and the Assembly was endowed with all powers of the Council.

If the foregoing measures were futile, sanctions were envisaged in Article 16. If a Nation resorted to war despite such measures, it was deemed *ipso facto* to have committed an act of war against all other members of the League, which were bound to sever all trade and financial relations and apply full economic sanctions. Furthermore, the Council was to *recommend* what military, naval or air forces the members of the League should severally contribute to protect the League covenants, but the members were not specifically bound to comply.

League Procedure Failed Because Not Backed By Force

The foregoing procedure was not really put to the test until Japan started on the conquest of Manchuria in September, 1931. China, sorely beset, tried, on September 21, first to obtain Council action under Article 11 of the Covenant. Our then Secretary of State, Mr. Stimson, felt he should collaborate with the League, but due to political uncertainties at home, his gestures of collaboration were psychologically nul-

lified by declarations as to independent action.

From the beginning the Japanese saw that there was little danger of either the United States or England going beyond remonstrances. Japan continued to attend the Council meetings and while protesting her virtue, endeavored to prevent effective action though seeming to agree to cessation of hostilities and withdrawal of troops. Japan objected to the naming of a Commission of Inquiry, and later espoused the idea, knowing full well, as the Chinese representative indicated, that unless there was an actual cessation of hostilities and a withdrawal of troops, it would only give the Japanese more time to go forward with their plans.

When on January 29, 1932, Japan attacked Shanghai, the Chinese Government in desperation invoked Articles 10 and 15, because of aggression against her territorial integrity and a threatened rupture. As the Council could accomplish nothing, China, within the time limit of two weeks, requested that the dispute be referred to the Assembly. With the courageous leadership of the small powers in the Assembly, Japan's action in Shanghai was condemned, and a resolution was adopted on March 11, 1932, outlining a procedure to be followed. Apparently yielding to the influence of world opinion, Japan withdrew from Shanghai, and the *status quo* was reestablished about the middle of May. However, it would appear that a compelling factor in this withdrawal was the arrival of a Chinese Army with much greater strength than the Japanese had anticipated.

Meanwhile, Japan had consolidated its position in Manchuria. The Commission of Inquiry under Lord Lytton, the United States being represented through General Frank R. McCoy, found the facts to be against Japan. The report was submitted to the Council in November, and on December 6 to the Assembly, which on February 24, 1933, condemned Japan. That country merely withdrew from the League and extended its operations in China. This ineffectiveness impaired League activities everywhere.

Thus, in the spring and summer of 1932, the organization that had been born out of a desire to avoid a repetition of World War I lost its dynamic force just as the militant Nazi party was rising to power in Germany. There is not much doubt that fear of the Nazis caused the French and the British to woo Italy for aid. In 1923 the Italians had helped to sponsor the membership of Ethiopia in the League, but when Mussolini decided to take over that country he is said to have been assured by Laval that France would not stand in his way.

Ethiopia appealed to the League on four successive occasions and finally, due to the pressure of the lesser States, sanctions were imposed which caused some hardship to the Italian people but did not in any way deter the Government itself, because they did not interfere with supplies of basic war materials, such as oil. Even these ended when Sir John Simon stated that he "was not prepared to risk a single ship to preserve Abyssinian independence." Viscount Cecil frankly admits this was the "deathblow to collective security and indeed to the League as a guarantee of peace." Hitler had a green light for his conquest of Austria, the Sudetenland and Czechoslovakia. It was only when he attacked Poland on September 1, 1939, that the French and British realized the time for temporizing and appeasement was past, and only recourse to arms could save them.

The last event proves that what was needed from the beginning was willingness on the part of the members of the League to pledge all their strength, military as well as economic, to carry out the Covenant. If they had made such a pledge and fulfilled it, and especially if they had received similar American support, one can reasonably assume that Japan would not have proceeded in Manchuria, nor Italy into Ethiopia nor would Hitler have reoccupied the Rhineland and progressively overwhelmed country after country in Europe.

The international law that has been developed through the League over twenty-five years is nevertheless a real achievement. The resolution of the Assembly of March 11, 1932, amalgamated (1) the Covenant of the League, (2) the Pact of Paris outlawing war as an instrument of national policy, and (3) the substance of the Stimson Doctrine of January 7, 1932, to the effect that any situation, treaty, or agreement brought about by means contrary to the Covenant and the obligations of the Pact of Paris, should *not* be recognized by the United States and by the members of the League. This resolution constitutes the cornerstone for the rebuilding of an organization to maintain peace. However, the law, without a prompt and effective sanction, will give no more security in a major crisis in the future than it did before.

It is true that the Council and the Assembly of the League could only recommend action to the several governments which would then have to carry it out in accordance with their respective constitutional processes. The crux of the successful operation of any new machinery for peace is whether a way can be found for the members of the Organization to place at the disposal of the Organization military force which can at once be directed against any threat to the peace. The possibility of the use of force must be recognized as involving in the last analysis all the military and economic resources of the member States, just as the present war has done. However, just as the growth of order in the Community has made it unnecessary to give everything to its preservation, so also the pledging by each member of its national strength, along with that of other peace-loving Nations, to the preservation of order in the world community, should obviate in the long run the necessity of actually supplying more than a relatively little force to maintain peace.

The conferees at Dumbarton

(Continued on page 207)

The World Court
A Typical Regional Conference

by Robert T. McCracken

CHANCELLOR, PHILADELPHIA BAR ASSOCIATION

The twelfth regional group conference on the World Court, arranged by the Association's Special Committee as to Proposals for the Organization of the Nations for Peace and Law was held at Philadelphia on February 2, 1945. Those present at the conference were:

GRIER BARTOL, Philadelphia, Pa.
Counselor at Law.

JOHN DICKINSON, Philadelphia, Pa.
General Counsel, Pennsylvania R.R. Co. Professor of Law, Law School, University of Pennsylvania.

GEORGE A. FINCH, Washington, D. C.
Director of the Division of International Law, Carnegie Endowment for International Peace.

EARL G. HARRISON, Philadelphia, Pa.
Member of Saul, Ewing, Remick & Harrison. Formerly Commissioner of Immigration and Naturalization.

JOSEPH W. HENDERSON, Philadelphia, Pa.
Member of Rawle & Henderson. Formerly Chairman of the Board of Governors of the Philadelphia Bar Association and formerly President of the American Bar Association.

HON. MANLEY O. HUDSON, Cambridge, Mass.
Judge of the Permanent Court of International Justice; Member of the Permanent Court of Arbitration.

EDWIN R. KEEDY, Philadelphia, Pa.
Dean of the Law School, University of Pennsylvania.

WILLIAM DRAPER LEWIS, Philadelphia, Pa.
Director, American Law Institute.

WILLIAM CLARKE MASON, Philadelphia, Pa.
Member of Morgan, Lewis & Bockius. Formerly Chancellor of the Philadelphia Bar Association.

ROBERT T. MCCRACKEN, Philadelphia, Pa.
Member of Montgomery, McCracken, Walker & Rhoads; Chancellor, Philadelphia Bar Association.

HON. GEORGE W. MAXEY, Scranton, Pa.
Chief Justice, Supreme Court of Pennsylvania.

J. PAUL MCELREE, West Chester, Pa.
President of the Pennsylvania Bar Association.

JAMES R. MORFORD, Wilmington, Del.
Member of Marvel and Morford. Member of Board of Governors of the American Bar Association.

BERNARD J. MYERS, Lancaster, Pa.
Member of Zimmerman, Myers & Kready. Pennsylvania Delegate of the American Bar Association.

HON. WILLIAM L. RANSOM, New York, N. Y.
Member of Whitman, Ransom, Coulson & Goetz. Formerly President of the American Bar Association.

LOUIS B. SOHN, Cambridge, Mass.

THOMAS RAEBURN WHITE, Philadelphia, Pa.
Member of White & Williams.

ALLEN HUNTER WHITE, Philadelphia, Pa.
Member of Ballard, Spahr, Andrews & Ingersoll.

MORRIS WOLF, Philadelphia, Pa.
Member of Wolf, Block, Schorr & Solis-Cohen.

Arrangements for the conference were made by Joseph W. Henderson and Allen Hunter White, of the Philadelphia Bar.

An excellent description of the first of these group conferences, which was held in Boston on December 11, 1944, appears in the January issue of the JOURNAL. Since that article sets forth in detail the fourteen questions discussed and the comments thereon, no repetition thereof need here be made. It is believed, however, that a brief description of the manner in which the conference was conducted may be of interest to those who have not attended one.

The meeting opened at 10:00 A. M. and lasted until 6:00 P. M. It was held in the Rittenhouse Club, and luncheon was served in a room adjoining the conference room. It was definitely an eight-hour day, but no one thought that it was a long day. The time schedule was strictly maintained. Judge Hudson stated at the beginning that the exposition of the fourteen questions would continue until about three-thirty and that the "weight of the meeting" would be taken from then until six. This is precisely what occurred.

Judge Ransom's contributions throughout the conference were of inestimable value. He has attended many of the meetings and knows exactly when and where the right word should be put in to clarify matters.

The performance of Judge Manley O. Hudson, who conducts the entire affair, is simply amazing. To begin with, he probably knows as much about the Permanent Court of International Justice as any man living. He has been a member of it since 1936. He is completely familiar with its history, is steeped in its traditions, understands to the full its methods of operation, and has pondered long and deeply upon the philosophy of its creation and existence. He gives primary attention to Chapter VII of the Dumbarton Oaks Proposals, which deals with an international court of justice. He is profoundly concerned over the kind of a court that is going to be. He has devoted the winter to such discussions as this one. Before he is through, he will have conducted them in twenty leading cities in the United States and at least five in the Dominion of Canada. The cumulative force of all this was vibrant in

all that he said and did. The effect upon those who heard him, and participated with him in the discussion, was stimulating in the highest degree.

He has a *fidus Achates*, Mr. Louis B. Sohn, of the Harvard Law School. Mr. Sohn has charge of the documents, with which he is completely familiar. He keeps them in a neat pile on the table. When there is occasion to refer to one of them, Judge Hudson does not even need to call for it. Mr. Sohn has it open at the right page, and pushes it over in front of him. The team work is perfect. It appears to be actuated by thought transference.

Judge Hudson opened the discussion with a concise but comprehensive statement describing the make-up of the present World Court, the kinds of questions which have come before it for decision, the manner of their presentation, and something of the decisions which have been rendered. He called attention to the brief and very general provisions of Chapter VII of the Dumbarton Oaks Proposals, and pointed out that the fourteen questions before the conference for consideration necessarily arise because of this very general nature of the document itself. Discussion of the questions then began.

A rehearsal of this discussion would render the present article unreasonably long. It covered a period of about eight hours. Nineteen men participated in it. The questions propounded to Judge Hudson were many and searching. The views expressed sometimes varied widely at first, but in most instances gradually came together. The subject under debate was of such monumental import that it evoked the keenest thinking of which those present were capable. Not a moment was lost in frivolity.

Pre-War World Court a Going Concern

Of first importance, of course, is the question as to whether the present Court can be preserved. Founded in 1921, it has a comparatively short but distinguished record. Its judges, nominated as they are by the Permanent Court of Arbitration and elected by the League of Nations, have been uniformly men of outstanding quality, well-versed in international law. It has established precedents, developed procedure, attained confidence. It is, or was until interrupted by the War, a going concern of the first magnitude. Slight amendments to the statute creating it would bring it within the purview of the new United Nations Organization. It is certainly such a Court as is contemplated by the Proposals.

Assuming that this or a similar court will exist, numerous questions arise as to how it should function. Should it continue to give advisory opinions? Should it have special or regional chambers, in various parts of the World? Should access to the Court be open to all States? Should a judge *ad hoc* be appointed in a particular case when no national of a contending State is a judge of the Court? Should dissenting opinions be rendered?

Problems of Court's Jurisdiction

Problems were considered as to the nature of the Court's jurisdiction, whether optional with the parties to the suit or compulsory; the extent to which decisions as to whether or not a dispute is likely to endanger the maintenance of international peace and security may be arrived at by the Security Council in emergencies, even though the case is pending before the Court; to what degree are disputes of an international or of a domestic nature; whether provisions should be made for the enforcement of the judgments of the Court, if enforcement became necessary. Each of these vital questions was treated, first from the historical viewpoint, where such existed, finally from the practical angle. Indeed the whole exposition was practical to the utmost. It has to be. For the acid test of the continued existence of this Court is that it shall work. If no State will invoke its jurisdiction, it will eventually close its doors. And States will not do so unless its influence becomes so strong as to be irresistible.

That such a Court is needed if the World is to remain at peace goes without saying. Men do not readily agree with one another as to their rights, where their interests come in conflict. Nations, swayed as they are by mass psychology, are less likely to agree than are private citizens. Some means of settling legal controversies, other than ordeal by battle, must be found. The only alternative is a Court, a Court to which Nations will turn as readily as individuals do now. The setting up and maintenance of such a tribunal is our first order of business, next to the winning of the War.

Conferences Arouse Public Opinion

No one who spends a day with Judge Hudson can retain the slightest doubt of this statement. His surpassing knowledge of the subject, his absolute belief in his message, his dynamic presentation, his fairness of approach, as disclosed in his answers to questions, his captivating manner, render him an unmatchable advocate of the theme. He is irresistible. Whatever qualms one may have entertained in the morning have disappeared by three-thirty in the afternoon. By that time, everyone is eager to throw his weight into the meeting. Disagreements may, and do, then appear as to details—none as to the main issue. The existence of the Court is accepted as a matter of course. Its jurisdiction must be broad, its influence very great indeed. Matters of machinery only call for further discussion.

Public opinion, on a topic which does not have wide popular appeal, is difficult to arouse, more difficult still to crystallize. It lies under a huge dead weight of inertia. Great currents, repeated currents, must be passed through it, in order that it may be vitalized. Conferences such as these create those currents. The Committee which arranged them is doing a great work. It should rank as one of the Association's largest contributions to the future welfare of the Nation.

The Principles and a Pattern for the Peace

by Honorable Robert G. Simmons

CHIEF JUSTICE, SUPREME COURT OF NEBRASKA

Now and then judges, in deciding cases, become wearied by the effort to distinguish the differences in the details of legal opinions. Occasionally, and perhaps too seldom, they turn to fundamental proven principles of the law and on that foundation build a sure and just decision. Why not do that on the problems of the peace?

The American people are now confronted with the question of whether liberty and world peace can be assured under law. In our own country we have witnessed the settlement of disputes by an established system of justice according to law. These disputes go the full way from family quarrels to controversies between states and even with the national government itself. They go to liberty, to property, and to all the rights of men, including their right to think, to speak, to live and to worship. Trial by battle has been outlawed long since and only resorted to in diminishing cases, where the use of arms is necessary to enforce the judgment of our organized society. We have proved, as indeed have all civilized nations, that within our own borders it is not necessary to go to war to settle disputes.

It is obvious that some organization to attempt to insure peace will be set up after the close of this war. We are generally agreed on the objective. We seek the principles and the pattern by which such a system may be established among nations. Those in high places, who speak for us, are now working on that problem, and have suggested the principles and lately a method.

In World War I, we had President Wilson's Fourteen Points. The historians and the statesmen still debate their meaning. This war, so far as our nation is concerned, was preceded by the historic meeting of our President and England's Prime Minister, from which came the Atlantic Charter. There have followed the President's Four Freedoms, the declaration of the United Nations, the declarations issued from the Moscow conference and Teheran, and others. We now have the result of the labors at Dumbarton Oaks.

Disagreement, confusion and debate, too often of detail, have followed each of these pronouncements.

Any peace that is to be permanent and any organization that is to be acceptable must be founded on moral and spiritual principles that are understood by and acceptable to the peoples of the world. It must be a workable plan. It is to be remembered that, while officials of government may propose, the effective result will depend upon the final willingness of the peoples affected to make the sustained sacrifices and give the support that will insure vitality and power to such an organization.

Principles Found in the Age-Old Spiritual Faith

Let us then go to proven principles and a known, tried pattern—principles that are age-old, a pattern that has proved successful in this republic.

The principles upon which this republic is based are three. They are stated in our Declaration. They bear repeating. Men have unalienable rights which governments must respect and protect—these rights are stated in the Bill of Rights of our Constitution. Men are created equal. Governments derive their just powers from the consent of the governed.

Those principles have a spiritual foundation. Their source is in the belief of men in the fatherhood of God and the brotherhood of men. If you seek proof of this, study the influence of the churches, of church men as pastors, teachers and public leaders during that time. Study also the dominant place of the schools conducted by the churches in the then educational system. That belief and that alone was the unifying faith that brought and held the colonists together. We built this great nation, and based our entire system of jurisprudence upon that faith and those principles. For over a century and a half in America we, as a free people, have moved in accord with them. Admittedly we, as humans are wont to do, have failed to achieve the full realization of those ideals, but we have built upon that foundation, and we have had those ideals to inspire and to guide.

We in America do not have a monopoly upon that faith. The people of the Allied Nations do not have a monopoly upon that faith. Multiplied millions of peoples now ruled by the Axis powers have that faith also. It is the one fundamental ideal common to the peoples of every race and every nation.

But it may be said that we in America have succeeded in building and maintaining a government based

upon those principles because we are a united people. Let's examine the situation that existed when we adopted our constitutional system and started it in operation. For it is to that then, not to the now, that we must go to make the comparison.

The Pattern in Our Federal System

We were then thirteen, largely independent states, but recently colonies of England. We had thirteen separate and in some respects conflicting systems of government. We were a people of many racial ancestries, but recently removed from the mother countries. There were among us colonies of men and women from practically every nation and race of the old world, with different groups predominating in some of the states. These peoples collectively and individually had a pride in their race, their cultures, their old-country methods and traditions. We were of many races, not one race, at that time. Whatever merging into a people of one race then taking place was toward a state loyalty and a state citizenship. The national conception was not then predominant.

We were also a people of many creeds with different religious organizations dominant in certain of the states. For instance, there was the Church of England in Virginia, the Catholic Church in Maryland, the Quakers in Pennsylvania, the Congregationalists and Puritans in the New England and northern states. We, as a people, worshipped at many altars.

The states were not of equal strength and population. There were the powerful states of Virginia, Pennsylvania and New York, and others so sparsely populated that at least four of them did not have any city with a population of five thousand within their borders.

Some of the states had spent large sums in the prosecution of the war and were in serious financial difficulties—others had not and were not.

Some of the states had as their only industry a primitive agriculture. Others had become commercial centers, had developed some manufacturing and a not inconsiderable maritime business.

Physically close together, they, because of slow communications and means of travel, were far removed from each other. Other differences need not now be mentioned.

The weak states feared the strong, the strong were not too willing to undertake to carry the burdens of those less favorably situated. There were jealousies and antagonisms between states. They were tired when the Revolution ended, just as the people of this and other nations will be tired when this world war comes to a close. But they had their ideals, the three mentioned, that were common to all. They realized that something had to be done to assure peace, liberty, the well-being of all. The thirteen states sat down together, reconciled their differences, gave and took, drafted our constitutional system and builded our government.

Constitutional Government Was Result of Work, Effort and Sacrifice

Three further facts are to be remembered in comparing our then with the world's now. The Colonies first attempted to tie themselves together by the Articles of Confederation. They did not confer a power to enforce decisions. Congress became a debating society. The system fell apart as the result of its own infirmities. Second: There was a waiting period between the close of the war and the drafting and adopting of the Constitution, during which men reasoned together. Third: Constitutional government did not become an established fact when that instrument was adopted by the states. It came only as the result of years of work, effort and sacrifice guided by a faith and a will to make it succeed. But it came.

If thirteen states could do it then, why cannot thirteen nations, or twenty-six, or fifty, do it now? Superimpose the problems of the nations now upon the problems of the states then, and we find many that were common and few that were different. Our perplexities are no more difficult to us now than theirs were to them then. They solved them by building around a common spiritual faith.

Should not this nation frankly and simply declare that we fight that the unalienable rights of men will be preserved, protected and respected by governments on this earth; that the truth of the fatherhood of God and the brotherhood of man will control in man's relations with his government and his fellows; and that for all peoples there will be established governments that exist by the consent of the governed? Should we not declare that these truths will become the fabric of the treaty and will control in the writing of the peace? Should we not pledge our government honestly and courageously to advance these ideals among governments when the readjustments and the rebuildings come that will follow this war? Should we not declare that they will be maintained in the years ahead? We will then be declaring purposes that express the ideals and hopes of men of every race and creed—ideals that they understand and will support. If that is done, we may look forward to a lasting peace and real progress in self-government among men.

Should we not, can we not, now go to those same basic principles of the rights of men and of governments and, on our constitutional pattern, build the organization that will give the world the blessings that our system has given to us? It is a method that has been tried and proved. It is founded on the solid rock of the religious faith of men. Our ancestors, coming from many nations, made it succeed. Cannot their descendants in the many nations do likewise? I submit it is worthy of a trial.

"Books for Lawyers"

THE UNITED STATES AND THE WORLD COURT. *By Denna Frank Fleming. 1945. Garden City: Doubleday, Doran and Company, Inc. ($2.00). Pages 206, with index.*

Professor Fleming's new book is another step in his life-long issue with the constitutional rule requiring that treaties be made with the advice and consent of the Senate, two-thirds of the Senators present concurring. He has written numerous volumes about the Senate fight over the League of Nations' Covenant. This volume he has devoted to the much longer struggle for the adherence of the United States to the Statute of the Permanent Court of International Justice. This contest started in 1923, when President Harding and Secretary of State Hughes proposed such adherence. Though the step has been sponsored by all successive Presidents and Secretaries of State, the adherence has not yet been consummated. As late as 1935, the resolution of adherence was able to muster only 52 out of 88 votes.

Professor Fleming shows clearly the details of the efforts for adherence. There seem to be but few mistakes in his volume; for instance, the number of States represented at the 1926 Conference concerning the acceptance of the United States' reservations was forty and not twenty-two (page 74), and twenty-four States have adopted the conclusions of that Conference and not twenty-one (pages 80, 85). One wishes that the author would quote fewer newspapers and more official sources, especially the pertinent volumes of the *United States Foreign Relations*. There is no doubt anywhere in the book as to the side on which the author stands; the arguments of the opponents of the Court are presented in an atomized and disjointed form.

It is to be regretted, further, that the author did not find it necessary to discuss the issue of the obligatory jurisdiction of the Court. He does not mention that at least forty-five nations of the world conferred on the Court a large measure of jurisdiction, exercisable on the unilateral application of any party to the dispute; that almost all other nations of the world conferred some measure of jurisdiction on the Court, and that the United States and the Soviet Union conferred such jurisdiction on it by accepting the jurisdictional clause in the Constitution of the International Labor Organization. The author apparently does not attempt to advocate even that the United States should now accept the jurisdiction of the Court over some, perhaps very limited, classes of disputes. He evidently is minded to accept a defeat on this subject, without very strong protest; he joins the battle with what he regards as the minority of the Senate on the limited field of paying a part of the expenses of the Court and giving to it moral support through adherence to its Statute.

But when the author tries to lay bare what he regards as the machinations of the "bitter-enders," the "irreconcilables," he does it with gusto and vindictiveness. In exposing weak points in their armature, he minces no words, nor refrains from angry criticisms. Perhaps in reprisal, or else to help prevent a repetition of the past experiences, he leaves the subject of the Court entirely in his last chapter, and devotes his conclusions to the ways and means by which a minority in the Senate might be deprived of its veto power. He would like to have that veto power either abolished by constitutional amendment or circumvented by the use of joint resolutions or executive agreements. He does not take much stock in a Senate resolution which promises in cautious terms to favor in principle a general international organization. He fears that some Senators who do not mind joining in such a resolution might still shy away from some imaginary dangers of a concrete agreement, and so defeat it on a final vote.

While the author's exposition of the problems that have confronted the champions of the World Court during the last twenty years is rather one-sided, this book offers an introduction to methods sometimes used in the Senate as to treaties. It contains warnings for those who may be concerned with the ratification of the future agreements with respect to the Court and the United Nations Organization. The book thus has timely merits, for its historical data and its vigor. It is hardly in the spirit in which the vital issues as to law, justice, and the World Court are now being approached, in the Congress as well as on the part of other leaders of the Governments who are to deal with such matters in the San Francisco Conference. Revival of ancient acrimonies can hardly be helpful in the concerted efforts, now under way on a large scale, to accomplish the full adherence of the United States to the Statute and to give the Court an integral and vitalized part in the new international organization for peace, justice and law.

LOUIS B. SOHN
Cambridge, Massachusetts

THIS IS CONGRESS. *By Roland Young. 1944. New York: Alfred A. Knopf. ($2.75). Pages XII, 267.*

STRENGTHENING THE CONGRESS. *By Robert Heller. 1945. Washington, D. C. National Planning Association. (25c). Pages 41.*

"What is the matter with Congress?" As one of its members recently pointed out, the question is a hardy perennial. However, the dissatisfaction that has dictated the inquiry has not always been the same.

Some of us can remember the apprehension once felt at the convening of Congress and the sigh of relief that followed its adjournment. What was considered an ideal record was one of inaction. The more usual criticism in recent years has been either that Congress has entirely failed to act or in acting has abdicated its function of legislating by delegating its powers to the Executive.

One reason for this change of attitude has been the growth of Presidential leadership. Urgent and momentous problems have demanded immediate solution. Congress has seemed to possess neither the leadership nor the machinery to enable it to formulate a national policy on many things. The President is depicted as the one representative of the Nation as a whole. He alone is the cynosure of, and has means of appealing to, all the voters. Every citizen is his constituent; and when these constituents are overwhelmingly in accord with his policies, his influence is almost irresistible.

The only escape from this situation is for there to arise in Congress leaders who are capable of initiating, or at least of constructively criticizing, policies and for the Congress to provide the machinery by which its proposals can be adequately translated into legislation. Those who deprecate the necessity or even the advisability of this insist that there is nothing harmful in the delegation of legislative power so long as it is done consciously by the freely elected representatives of the people. They fail to see, or at least to admit, that much of the delegation is unconscious. No President is omniscient, and so complex and numerous are the problems confronting him, that not infrequently the measures to which he lends the prestige of his advocacy are conceived by subordinates and accepted on faith. Legislative blank checks are filled in by the heads of departments or of independent agencies or bureaus, and often by their aides. In these cases Congress has in advance little to do with the fashioning of policy and is frequently ignorant of what it ultimately becomes and especially of how it is enforced.

This has resulted not from any designed usurpation on the part of the Executive, but because, in order that the business of government might go on, it was necessary to assume a task as to which Congress had not risen to the need.

Those who are conscious of the condition are not in agreement as to the remedy. The extremists would substitute parliamentary for Congressional government[1]; the apologists discount the criticism and would be content with minor changes in procedure.[2]

Both Mr. Young and Mr. Heller are keenly aware of the inadequacy of Congress, but neither advocates any Constitutional change. Their concern is with explaining Congress, bettering its personnel, and improving its organization.

Their discussions admirably supplement one another. Mr. Young, although in the last chapter he makes some suggestions for improvement, is chiefly concerned with giving an exposition of the functioning of Congress. For this task he is well qualified by his experience as secretary of the Senate Committee on Foreign Relations and by his comprehensive knowledge of the folk lore of both Houses. He is especially helpful in illuminating the viewpoints of average members by quotations from the *Congressional Record*.

Mr. Heller assumes that his readers have most of the information that Mr. Young imparts; he outlines a comprehensive plan for a more influential and efficient legislature. His proposals may be roughly grouped under four heads: Enlarging the calibre of members, giving to the Senators and Representatives sufficient and proficient assistants, increasing the equipment of both Houses; and, finally, a simplified and efficient organization.

In order to raise the level of Congressional ability the annual salary of members would be fixed at $25,000 and retirement pay provided.[3]

Individual members would be given more assistance by making adequate their personal staffs, by establishing a Congressional service bureau and by expanding the Legislative Reference Service of the Library of Congress. Thus relieved of the necessity of serving as chore boys for their constituents and being properly informed as to pending bills they could more efficiently perform their primary duty of legislation.

Similarly Congressional committees would be given independent staffs comparable to those of the Executive departments upon which they now seem largely dependent.

The committee structure would be strengthened by reducing the number of members to fifteen, for a committee in either house, and by making them so far as practicable equivalent, by entrusting administrative matters to joint committees; and by abolishing the seniority rule for committee chairmenships.

Each House would have a Majority Policy Committee, composed of the chairman of each major standing committee and chairmaned by the majority leader, and a Minority Policy Committee, composed of ranking minority members. In this way it would be possible to fix the responsibility for action or inaction.

With their burdensome routine duties lessened and their organization made effective, members would give more attention to basic national affairs and take a constructive part in shaping major policies.

There would be designated times for Question Periods, during which members of the Cabinets would appear and submit to questioning in accordance with the plan proposed in the Kefauver Resolution.[4]

(Continued on page 214)

1. *A New Constitution Now.* By Henry Hazlitt, of *The New York Times*. New York: Whittlesey House. 1942.

2. *A Member of Congress Looks at Congress.* By Charles A. Eaton, Member of Congress from New Jersey. *The New York Times Magazine*, March 4, 1945.

3. To this The New York *Times* has editorially added the suggestion that the State constitutional residential requirements be repealed. *Strengthening the Congress.* The New York *Times*, January 17, 1945.

4. The Kefauver Resolution. 30 A.B.A.J. 326-329, June, 1944.

Editorial

The Nations United at San Francisco

Soon after this issue comes to the desks of American lawyers, the great Conference of the United Nations will meet in San Francisco, to draft the Charter to bring into being a general international Organization for peace and security. Appropriately, we devote this number principally to material which we hope may assist those who, as draftsmen for Governments or as spokesmen for public opinion, are dealing with the many questions on which the hopes of men so much depend.

In behalf of American lawyers, we welcome most warmly to the United States and to the City of the Golden Gate the jurists and lawyers who have come from other lands to fashion the structure and the safeguards of the new Organization. They and the other delegates and expert staffs who represent the assembled Nations of the peace-loving world will find that they are in a country which is most hospitable, not only to them personally and officially, but also to their zeal and skill in behalf of the purposes of this epoch-marking Conference.

Especially do we extend in advance a hearty and fraternal greeting to all those from the Americas—the spokesmen for Canada to whom our kinship is so close, our companionable brethren from Central and South America, Mexico, Cuba, and the West Indies, with many of whom we have so often exchanged views and worked in good causes. Understanding and cooperation between the lawyers of the Americas were the forerunners of the unity at Chapultepec.

The delegates will find that they have come to an embattled country which has been and is engaged in a great deal of forthright but open-minded discussion, not so much of the high objectives of the Conference, as of the practicable ways and means of achieving them. Public opinion in the United States is earnest, militant, outspoken; the rank and file of people would like very much to help.

Especially so the lawyers. The questions raised, but not answered, by the Dumbarton Oaks Proposals as issued last October 7, particularly in relation to international law and the Permanent Court of International Justice, seemed to need and call for active interest on the part of members of the profession of law. They are questions on which the considered judgment and experience of jurists, teachers and practitioners may well carry weight. They have led, among other things, to a new and long step forward, in the cordial and cooperative relationship between the Canadian and the American Bar Associations.

A long-customary method of dealing with such questions has been, in first instance, the preparation of a report by a Committee, which reflects usually the views of a few men of special qualifications. In view of the overwhelming importance of finding the right answers to these questions, the Committees of the two Associations decided to draft no report and make no recommendations until they had first learned the considered views of representative lawyers in all parts of the two countries.

So they took the questions out to the lawyers, and sought "grass roots" opinions, in meetings held in many different centers. Travel limitations would have precluded any other course, but this was really the most suitable.

Cooperating in a common effort, the two Committees conducted eighteen Regional Group Conferences in the United States and seven in Canada. After discussion, the "weight" of the opinion on each of the questions was ascertained in each meeting. The combined "weights" enable a consensus which reflects the considered judgment of more than six hundred lawyers, from Halifax to Houston, Vancouver to Jacksonville, San Francisco to Boston, Chicago to New Orleans.

Details of the meetings, the methods, and the specific conclusions for consideration on the open questions, are published elsewhere in this issue. Significant also is the joint statement of common objectives, in behalf of the two great Bar Associations. Regrettably, under the limitations of travel and time, more meetings

AMERICAN BAR ASSOCIATION

Journal

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could not be convened and held, with larger attendance at each.

There was a background for each meeting, and it was set by the state of the world. Nearly every man present had a son, a brother, a near relative, or a partner, overseas in the Armed Forces of his country. Many had suffered tragic losses. Everyone was eager to do what he could to prevent the recurrence of wars. Common objectives and an organized cooperation for times of peace *must* be achieved by the Nations while still they fight.

From deep emotions came a sense of comradeship. Men were logical, but they spoke from their hearts. Underneath all was a strong, determined current; its strength was spiritual, but the mood was also practical and realistic.

A month before the Dumbarton Oaks Proposals were published, the American Bar Association, through its House of Delegates, had declared emphatically in favor of "the earliest possible establishment" of a general international organization for peace, justice and law, with the Permanent Court of International Justice as an integral part of it, a broadened scope and authority of international law as its foundation, and with authority in the Organization to use armed force, if need be, to prevent aggression, maintain peace, and enforce the law-governed judgments of the international judiciary. The declarations of the American Bar Association in September were in many respects more specific than was the plan outlined in the Dumbarton Oaks Proposals in October.

Throughout the present Association year, the American Bar Association, under the leadership of its President, David A. Simmons, of Texas, has steadily advocated the principles declared by its House of Delegates. He has vigorously urged them in addresses throughout the country. The Section of International Law has convened or cooperated in public meetings for informative discussions. The JOURNAL has devoted much of its limited space to significant contributions to reasoned public opinion.

The Special Committee created by vote of the House of Delegates has conducted its notable Regional Group Conferences, within the wartime restrictions on travel and hotel accommodations, and has brought closer our organized cooperation with our brethren north of the border.

Among the useful results have been the demonstration of an amazing unity of vigorous opinion, among the jurists, teachers and lawyers of the two countries, in favor of the retention of the Permanent Court of International Justice, all practicable extensions of its compulsory jurisdiction, a broadening of the concepts of what disputes are justiciable and adjudicable, an increased emphasis on the role of law and adjudication in international affairs, and a team-work effort in San Francisco to lay the foundations for a lasting peace of justice and law. The contributions of the two great Bar Associations have been as to the legal aspects of the problems, because in that field is our competence.

Many thorny and difficult problems remain for discussion and for solution in the Charter of the Golden Gate. We doubt if any of them will be found insoluble, if they are approached with an earnest desire to find acceptable solutions within the limits of mutual respect for others' views, long-run perspective, common sense, and fair play.

Not all of the problems as to any new organization can be resolved in its initial charter. The whole history of the American Constitution attests that. To "establish justice" is a task for the centuries; "new occasions teach new duties" and require new methods of accommodation and adjustment. The formulations to be made in San Francisco need statesmen and builders, not perfectionists or stubborn strivers for the ultimate.

Thus far the American Bar Association has not supplemented its resolutions of last September (A.B.A.J. October 1944 issue, pages 545-547; November 1944 issue, pages 645-59; December 1944 issue, pages 683-86) with definitive action on more specific subjects. Its contributions, as shown elsewhere in this issue, have consisted mainly of making available, to those dealing with tasks of draftsmanship, the consensus of professional opinion and judgment arrived at in the Regional Group Conferences in all parts of the United States and Canada. At its meetings in Chicago on April 4-6, the Board of Governors, in view of the inability to convene the House of Delegates, will decide on the further action of the Association.

The great objectives of those who seek to do practicable things to restore a world of peace and justice will not be easy of attainment. Forces of evil and might are still at loose in our world. But they are inexorably being ground down to extinction by the Armies, the Navies, and the Air Forces, of the Allies.

There will remain the inherent difficulty and the unprecedented nature of our tasks. These can and will be surmounted by devoted work and by giving heed to the hard lessons of the past. We incline always to think that we gain ground too slowly.

Yet, in the darkest hour, the Prime Minister of Great Britain found that an almost unknown poet who died in 1861 had prophesied for us:

> For while the tired waves, vainly breaking
> Seem here no painful inch to gain,
> Far back, through creeks and inlets making,
> Comes silent, flooding in, the main.

The *main*, now flooding in toward the Golden Gate, comes from the aspirations of the plain, the humble, the real people of this earth. Lawyers of the many localities cancelled other engagements and contributed their best to the meetings because they *shared* the hopes of their communities that practicable things could be wrought and done, for a better world order. Even with the best of good fortune our lives contain and carry

(Continued on page 208)

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Courts—Jurisdiction Over Federal Employer Liability Cases—Effect of Attempt to Institute Action in a State Court Which Has No Jurisdiction Under State Law.

While appellate proceedings in respect of an action filed in an Illinois City Court were pending, the Illinois Supreme Court ruled that actions of the class in question were not within the jurisdiction of the City Courts and later ruled that the particular action could not be transferred to the Circuit Court. Meanwhile, the statute of limitations had run against the action. On certiorari, the Supreme Court directed that the case be continued to permit an application to be made to the State Supreme Court to determine whether its ruling rested on an adequate state ground or whether decision of a federal question was necessary to disposition of the case by the state court.

Herb v. *Pitcairn, et al.*, & *Belcher v. Louisville & Nashville Railroad Company*, 89 L. ed. Adv. Ops. 481; 65 Sup. Ct. Rep. 459; U. S. Law Week 4174. (Nos. 24 and 25, argued October 17 and 18, 1944, decided February 5, 1945).

The opinion here deals with two cases which were consolidated for argument because involving the same questions. The actions were brought by railroad employees under the Federal Employers' Liability Act, the plaintiffs having brought their actions in Illinois, one in the City Court of Granite City and the other in the City Court of East St. Louis. Both plaintiffs obtained verdicts and judgments in substantial amounts. While legal proceedings were still pending in the two cases, the Supreme Court of Illinois rendered a decision that, under the Illinois Constitution, the City Courts are without jurisdiction in any case where the cause of action arose outside the city where the court is located. Since both of the present causes of action arose outside of the cities in which the actions were filed, the plaintiffs moved under the Illinois Venue Statute to transfer the causes to state Circuit Courts. The railroads, more than two years after the accidents, appeared specially in the Circuit Courts and moved for dismissal on the ground that the City Courts had no jurisdiction to entertain the cases and that, since all prior proceedings were utterly void, no action was pending or properly commenced by the City Court process, or by transfer and that, since no action had been commenced in a court of competent jurisdiction, any right under the Federal Act had expired by limitation. Section 6 of the Federal Employers' Liability Act provides that "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued." The motions to dismiss were granted, and the Illinois Supreme Court affirmed.

On certiorari, the Supreme Court directed that the causes be continued for a sufficient period to enable counsel for the employees to apply to the State Supreme Court for amendment or certificate which will show whether that court intended to rest the judgments herein on an adequate and independent state ground or whether decision of a federal question was necessary to the judgments rendered. Mr. Justice JACKSON delivered the opinion of the Court.

The opinion sets forth the view that the State Supreme Court probably decided that, as a matter of Illinois law, no action is pending against the railroads in any court, and that all of the proceedings had been of no effect whatever. Had that court rested its decision upon its expressions as to the jurisdiction of the Illinois courts and the adequacy of their procedures to bring an action into existence, Mr. Justice JACKSON says that the Supreme Court would be without power to direct the state courts to try cases which, as a matter of local law, are not pending. However, the Illinois courts did not stop at that point, because the certificate which it received from the lower court stated that a federal question was involved and that was whether the action was barred by the federal statute of limitations. The contention was made, therefore, that the judgment did not rest upon a state ground but upon an erroneously decided federal ground. It was to permit the State Supreme Court to clarify its holding on this question that the cause was held under advisement in the Supreme Court. Stressing the importance of preserving the distribution of judicial power between the state and federal courts as the ground for obtaining clarification from the state court, Mr. Justice JACKSON says:

> *This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.*
>
> * * *
>
> *But what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court. In many cases the answer has been a strict adherence to the rule that it must*

*Assisted by JAMES L. HOMIRE; Tax cases by Committee on Publications of the Section of Taxation, Mark H. Johnson, chairman.

affirmatively appear that the federal question was decided and that its decision was essential to disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this Court will not review. . . .

In other cases where justice seemed to require it, for example because of supervening events, the Court has said that to set aside the judgment and remand the case to the state court for further consideration is not to review, in any proper sense of the term, the decision of the state court. . .

* * *

It is no criticism of a state court that we are unable to say in a case where both state and federal questions are presented, discussed, and perhaps decided, that the judgment would have been the same had only one of the grounds been present. Those courts may adjudicate both kinds of questions and because it is not necessary to their functions to make a sharp separation of the two their discussion is often interlaced.

* * *

It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. Nor will we review one until the fact that it does not do so appears of record.

Mr. Justice BLACK delivered a dissenting opinion, in which Mr. Justice MURPHY and Mr. Justice DOUGLAS joined. In his opinion, he urged that the record clearly showed that federal questions had been decided by the state court which should be decided by the Supreme Court without further action by the court below. He urged also that, even if there were an adequate state procedural ground for dismissal of the suits, that would not end the controversies though it might prolong the litigation. As to this he says:

This is true, because it is beyond belief that dismissals on these procedural grounds would bar new actions based on the injuries. And the federal question so clearly presented here and now, could hardly be escaped in new actions. That question is, "Are these suits barred by Section 6 of the Federal Employers' Liability Act"? This question presents a twofold problem: (1) Does Section 6 have any application to these actions; (2) If so, should the word "commenced" be construed so as to make the beginning of the suit in the City Court such a commencement?

With respect to the first of these questions, it is pointed out that both complainants alleged violations of the Federal Safety Appliance Act, violation of which is said to contain no statute of limitations. It is also urged that the term "commenced", as used in the Federal Employers' Liability Act, may be so construed as to include the actions here involved.

Mr. Justice BLACK's dissenting opinion also urges that the two cases are not exactly parallel and that the record shows that the *Belcher* decision rested squarely and exclusively on the Illinois Court's conclusion that the cause of action was barred by Section 6 of the Liability Act.

Mr. Justice RUTLEDGE also delivered a separate dissenting opinion.

The cases were argued by Mr. Roberts P. Elam for Herb and Belcher and by Mr. Bruce A. Campbell for Pitcairn et al. and Louisville Railroad Company.

Public Contracts—Land Purchases—Eminent Domain—Evidence.

The Act of July 2, 1940, which forbids the use of the cost-plus-percentage-of-cost system of contracting, except when deemed necessary by the Secretary of War, applies to contracts for the purchase of land.

Land purchase contracts which show the intent of the government to pay its real estate agents for services in negotiating the purchase of land, a percentage of the price does not fall within the language of the cost-plus-percentage Act, and is not contrary to public policy.

Muschany v. *United States*, 89 L. ed. Adv. Ops. 492; 65 Sup. Ct. Rep. 442; U. S. Law week 4186. (Nos. 31 and 32, argued October 18, 1944, decided February 5, 1945).

The War Department tried to acquire by purchase an adequate site for an ordnance plant at Weldon Springs, Missouri. Part of the land had thus been acquired by contract between the Government and the owners. Since that method proved ineffective for the necessities of the situation acquirement by condemnation was resorted to.

On the trial two of the defendants who had given a government real estate agent options for the purchase of their lands at a price which included five per cent of the agreed value for the real estate agent's commission, offered the option contracts in evidence as proof of value.

The District Court sustained the validity of the contracts between the land owners and the United States, granting an option for the purchase of part of the land. The Circuit Court of Appeals reversed the judgment of the District Court, holding that the contracts were invalid and that the property owners were not entitled to the prices therein fixed because there was included therein the amount of the government's real estate agent's commission. The case was taken to the Supreme Court on certiorari and the decision of the Court of Appeals was reversed.

Mr. Justice REED delivered the opinion of the Court. The opinion states the authority of the various transactions involved and particularly those of the Act of July 2, 1940, in regard to the cost-plus-a-percentage system of contracts from which the following is quoted:

Provided further, *That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.* 54 Stat. 713.

The whole course of the dealings between the Government, its real estate agent and the property owners is set out, showing the effort first to purchase all the land needed for the establishment of an ordnance plant, the failure thereby to acquire quickly all the land needed, the controversies that had arisen as to that method of procedure, its abandonment and the institution of condemnation proceedings for the accomplishment of the needed objective. As to the course of the case below, Mr. Justice REED says:

> *The two cases were decided in favor of the validity of the contracts and the compensation was fixed at the price stated in the contract without revaluation. Consequently there was no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price. The Government makes no objection to this manner of determining compensation if the accepted option (contracts) are valid.*

In regard to the issue of fraud, Mr. Justice REED says:

> *. . . this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid. Since these matters are not before us, we need express no opinion on this aspect of the case.*

There was evidence indicating that the prices originally paid by the owners of the lands in question at the time of purchase by them were far in excess of the prices fixed in the contracts. On that point, Mr. Justice REED says:

> *There remains to be considered the question whether mere disparity between the original cost of these lands to the seller and the sale price to the government makes the contracts illegal—whether a contract with the government is invalid on a mere showing that it was highly profitable but not unconscionable. Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court.*

The subject of the applicability of the cost-plus percentage clauses in a contract was discussed and Mr. Justice REED says:

> *We are of the opinion that the first section of the act of July 2, 1940, . . . indicates that the purchase of land by the War Department is subject to the provisions of that section; therefore, the proviso in the section which prohibits use of the cost-plus-a-percentage-of-cost system of contracting must be taken to apply to purchases of land. The act of July 2, 1917, 40 Stat. 241, 518, authorizing the purchase of land, is limited by the quoted section from 54 Stat. 712.*
>
> * * *
>
> *The purpose of Congress was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs.*
>
> * * *
>
> *The vendors' contract, when read with the McDowell contract, shows that the Government arranged for a fee to its agent based on a percentage of the purchase price. This does not fall within the language of cost-plus-a-percentage-of-cost. The offer was to sell to the Government at a fixed, definite price.*
>
> *. . . The Government knew the total cost when it became bound on the contract. If we read the vendors' contract as affected by the McDowell contract, no cost-plus contract emerges. The United States knew its agent's fee to the penny when it accepted the option. It was five per cent of the gross sale price.*

The contracts and the award were attacked on the grounds that they were contrary to the public policy. On that subject Mr. Justice REED says:

> *Public policy. The Government advances a further and distinct argument for affirming the judgment of the Circuit Court of Appeals that the vendors' contract is invalid. This is that the contracts of Muschany and Andrews are invalid as against public policy because of the interest of McDowell which is antagonistic to the United States and because of the contingent character of the McDowell fee which, it is asserted, is paid by the vendors for the procurement of the contract of sale. We think that it is inadmissible to view the McDowell contract and the vendors' contracts as unrelated. On account of the vendors' thorough understanding of McDowell's agency, as discussed in the preceding division of this opinion, their contracts must be read as though the McDowell contract was written into them to show his agency for the Government.*
>
> *When this is done, it is clear that the objection to the vendors' paying a fee contingent on the securing of a Government contract disappears.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE joined. The grounds of dissent appear from the following excerpt from the opinion:

> *The Constitution provides that the government shall not take private property for a public purpose without payment of just compensation. The problem here is whether the arrangements now before us give rise to enforcible agreements or whether the rights*

of the parties are to be governed by the constitutional requirement for "just compensation" for the land needed by the government.

Mr. Justice BLACK summarizes the evidence in support of his view that the arrangement between the Government and its agent, on a cost-plus-five per cent commission basis, enhanced the price of the options for purchase of much of the needed land. As to the effect of that system of acquiring the land, Mr. Justice BLACK says:

. . . the terms of McDowell's contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself.

Mr. Justice BLACK reviews the experience of the Government with "cost-plus" contracts during the first World War and the legislation which prohibited such contracts except "when such use is deemed necessary by the Secretary of War." (54 Stat. 713) and says:

. . . I should think that if these statutes could be given any effect, under the circumstances of these cases, they would but provide an added reason why the government should not be required to pay these landowners more than "just compensation."

In the concluding paragraph of his dissent, Mr. Justice BLACK says:

At the very least, I think the government is entitled to have the Circuit Court of Appeals pass on the questions of fraud, unconscionability, and unjust enrichment which this Court says "are available whenever and wherever transgressions take place."

The case was argued by Mr. Samuel M. Watson for Andrews, by Mr. William R. Gentry for Muschany's and by Mr. Paul A. Freund for the United States.

Tariff—Valuation of Foreign Currency.

Where an importer pays for his goods with foreign currency purchased at a "free" rate, it is improper to value the goods at a higher "official" rate of exchange published by the Secretary of the Treasury.

Barr v. *United States*, 89 L. ed. Adv. Ops. 515; 65 Sup. Ct. Rep. 522; U. S. Law Week 4181. (No. 287, argued December 15, 1944, decided February 5, 1945).

The question in this case is the proper rate at which the currency of the invoice of imported goods should be converted into United States dollars under § 522 (c) of the Tariff Act of 1930. 46 Stat. 739, 31 U.S.C. § 372 (c). On May 13, 1940, petitioner imported into the United States at the port of New York certain woolen fabrics which had been exported from England on May 3, 1940. Payment for the merchandise was made with pounds sterling purchased through the Guaranty Trust Co. of New York in the New York market for cable transfer. The Collector of Customs converted the pounds sterling of the invoice into dollars at the "official" rate of exchange of $4.035. Petitioner claimed that the currency of his invoice should have been converted at the "free" rate of exchange of $3.475138, which the petitioner had permissibly used for the type of goods imported. He paid the higher rate and filed his protest against the Collector's action under § 514 of the Tariff Act of 1930. The Customs Court sustained the protest. The Court of Customs and Patent Appeals reversed. Certiorari was granted because of the importance of the questions presented.

The decision was reversed in an opinion by Mr. Justice DOUGLAS. The Court traced the legislative history of the Tariff Act relating to the valuation of foreign currency, and concluded:

This history makes clear the search which has been made for a measure of the true dollar values of imported merchandise for customs purposes which was accurate . . . and at the same time administratively feasible and efficient. The formula finally selected is dependent on the actual value of the foreign currency in our own money. The rate for the foreign exchange with which the imported goods are purchased is recognized as the measure of value of the foreign currency; the use of that rate reflects values in United States currency which are deemed sufficiently accurate to serve as the measure of the valuation of the goods for purposes of the ad valorem tax. As noted in United States v. Whitridge, *. . . the actual "unit of cost" conforms with the truth and the meaning of the invoice.*

The opinion grants that the statute did not contemplate two rates of exchange for a single currency, but holds that the policy of the statute would be violated by a compulsion to use a rate which was neither required to be used nor actually used in the transaction itself. It analyzes the authority given to the Secretary of the Treasury to "publish" rates of exchange after "certification" by the Federal Reserve Bank of New York. Here, the Bank had certified both the "official" and the "free" rates, and the Secretary had published only the "official" rate. The Court held that the Secretary's power with respect to publication was purely ministerial, and that his disregarding of the "free" rate could not control valuation for tariff purposes.

Mr. Justice FRANKFURTER wrote a dissenting opinion, in which Mr. Justice BLACK joined. The dissent emphasized the curtailment of the "historic and appropriate authority to protect the nation's fiscal interests" which is vested in the Secretary of the Treasury, and stated that the selection of an exchange rate has "implications far beyond translating into dollars the value at which a particular importer actually settled for the foreign price of his goods."

Mr. Justice JACKSON took no part in the consideration or decision of the case.

The case was argued by Mr. Bradley Colburn for Barr and by Mr. Ralph Fuchs for the United States.

Bankruptcy—Corporate Reorganization under Chapter X—Proper Corporate Action Necessary to Authorize Filing of Petition in Bankruptcy by Corporation.

Price, et al. v. *Gurney, et al.*, 89 L. ed. Adv. Ops. 524; 65 Sup. Ct. Rep. 513; U. S. Law Week 4184. (No. 410, argued January 12, decided February 5, 1945).

The debtor corporation in this case defaulted some twenty years ago on its obligations and more than fifty per cent of its stock was placed in the hands of voting trustees designated by the bondholders. The voting trustees were members of the bondholders committee and some of the voting trustees were directors and officers of the company, and since the creation of the voting trust, the bondholders have been in control of the company. In 1942 the trustee under the mortgage petitioned a state court for foreclosure of the mortgage. The company answered admitting the allegations of the bill and consenting to the appointment of a receiver and judgment was entered on the mortgage. Respondent, Gurney, acting for himself and other shareholders or holders of voting trust receipts moved to set the judgment aside. Gurney then as owner of seven shares of stock and agent for owners of 675 shares filed on behalf of the debtor corporation a petition for reorganization under Chapter X of the Bankruptcy Act, in the Federal District Court. The petition alleged that the assets of the company exceeded its debts and contained numerous allegations, the purport of which was generally that the management has mismanaged the company to the detriment of the stockholders.

The District Court approved the petition as properly filed, but later, after hearing, dismissed it on the ground that the board of directors of the company had not authorized the filing of the petition in bankruptcy. The Circuit Court of Appeals reversed.

On certiorari, the Supreme Court reversed the latter ruling in an opinion by Mr. Justice DOUGLAS. The opinion cites pertinent provisions of Chapter X which define the jurisdiction of the courts of bankruptcy, and emphasizes that whatever Congress might have done in the exercise of the bankruptcy power, it has limited the jurisdiction of the courts so as to exclude the power to settle intracorporate disputes as to who is entitled to act for a corporation in the filing of a petition in bankruptcy. The conclusion of the Court on this question appears in the following portion of the opinion:

> . . . under the Bankruptcy Act the power of the court to shift the management of a corporation from one group to another, to settle intracorporate disputes, and to adjust intracorporate claims is strictly limited to those situations where a petition has been approved. Thus § 156 provides for the displacement of the management and the appointment of a disinterested trustee in case of certain companies after approval of the petition. In other situations the court may continue the debtor in possession. § 156. The plan must include provisions "which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy" with respect to the manner of selection of directors, officers and the like. § 216 (11). And the plan must likewise provide for the retention and enforcement of claims, not settled or adjusted in the plan, which the corporation may have against officers, directors, and others. § 216 (13). But nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation. Respondents may have a meritorious case for relief. On that we intimate no opinion. But if they are to be allowed to put their corporation into bankruptcy, they must present credentials to the bankruptcy court showing their authority.

The case was argued by Mr. William W. Keifer for Price and by Mr. Charles W. Stiefel for Gurney.

Admiralty—Libel of Vessel Owned by Friendly Foreign Government—Immunity from Suit.

In view of the long established practice of the executive branch of the Government, the immunity from seizure of a vessel in proceedings in rem in admiralty extends only to vessels owned and possessed by a friendly foreign government, and will not be extended by the courts to vessels owned but not possessed by a friendly foreign government.

Republic of Mexico, et al., v. *Hoffman*, 89 L. ed. Adv. Ops. 533; 65 Sup. Ct. Rep. 530; U. S. Law Week 4193. (No. 455, argued January 11 and 12, decided February 5, 1945).

Certiorari to determine the question whether, in the absence of the adoption of any guiding policy by the Executive branch of the government the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned though not possessed by a friendly foreign government.

Both the District Court and the Circuit Court of Appeals concluded that, since the libeled vessel was not in the possession of the Mexican government, a friendly foreign power, immunity from seizure did not extend to the vessel notwithstanding that the Mexican government owned it.

On certiorari the judgment was affirmed, in an opinion by the CHIEF JUSTICE. The policy of the State Department and the practice of the lower federal courts are reviewed in some detail in the opinion, and the conclusion of the Court appears in the following portion of the opinion:

> The lower federal courts have consistently refused to allow claims of immunity based on title of the claimant foreign government without possession. . . .
>
> Whether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where

the interference with the vessel ousts the possession of a foreign state, . . . it is plain that the distinction is supported by the overwhelming weight of authority. More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this government has failed to do so. We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

Mr. Justice FRANKFURTER delivered a concurring opinion, in which Mr. Justice BLACK joined. The concurring opinion criticizes the rule which makes the immunity from suit depend upon possession by a foreign government because "possession, actual or constructive, is a legal concept full of pitfalls." The proper test, in view of the concurring Justices, is stated in the following portion of their opinion:

It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations", or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

The case was argued by Mr. Morris Lavine for the Republic of Mexico and by Mr. Harold A. Black for Hoffman.

Taxation—Estate Tax—Transfers Taking Effect at Death.

The entire value at the time of death of the corpus of a pre-1931 trust is subject to estate tax, where the decedent reserved a life estate, and where in addition he had a contingent reversion or a contingent power of appointment which was cut off by his death.

Fidelity-Philadelphia Trust Co. v. *Rothensies,* 89 L. ed. Adv. Ops. 511; 65 Sup. Ct. Rep. 508; U. S. Law Week 4178. (No. 263, argued January 4 and 5, decided February 5, 1945.)

Commissioner of Internal Revenue v. *Estate of Lester Field,* 89 L. ed. Adv. Ops. 514; 65 Sup. Ct. Rep. 511; U. S. Law Week 4180. (No. 578, argued January 5, decided February 5, 1945).

These are two estate tax cases involving pre-1931 trusts in which the decedent-grantor reserved the life income to himself. In the *Fidelity-Philadelphia* case, the grantor's life estate was followed by life estates to her two daughters, remainder to the daughters' surviving descendants; failing such descendants, the remainder was to be paid to the persons appointed by the grantor's will. In the *Field* case, the trust was to terminate upon the death of the grantor's two nieces; if the grantor was then alive, the corpus was to be paid to him; otherwise, the income was to be paid to named beneficiaries until termination, with the remainders subject to reduction or cancellation by the grantor's will or written instrument. The Circuit Courts in both cases held that the trusts were subject to estate tax as transfers by a decedent "intended to take effect in possession or enjoyment at or after his death." The decisions conflicted, however, on the question of whether the entire value of the trust corpus at the time of death was subject to tax. In the *Fidelity-Philadelphia* case, the Third Circuit held that the entire corpus was taxable, against the estate's contention that there should be excluded the value at the time of death of the daughters' life estates (142 F. (2d) 838). In the *Field* case, the Second Circuit held that the only taxable amount was the value of a remainder interest after the deaths of the two nieces (144 F. (2d) 62, rev'g 2 T. C. 21).

The Supreme Court, in opinions by Mr. Justice MURPHY (Mr. Justice DOUGLAS specially concurring) affirmed the first decision, and reversed the second. In both cases, the entire corpus at the time of death was held subject to estate tax. In neither case does the majority opinion mention *May* v. *Heiner,* 281 U. S. 238; presumably, therefore, reliance was not placed upon the sole factor of a retention by the grantor of a life estate in a pre-1931 trust. In each case, the Court pointed out the additional factors which made the decedent's death cut the "string" which he held against the interests of the beneficiaries, under the principle of *Klein* v. *U. S.,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106. In the *Fidelity-Philadelphia* case, this rather tenuous "string" was the power of appointment which could have taken effect at the grantor's death if she had survived her daughters and their issue, or after the grantor's death if the daughters' issue had not survived the daughters. It may be noted, however, that the concurring opinion in that case indicates that the contingent power of appointment is insufficient basis for the result, and that the majority opinion is an implied rejection of *May* v. *Heiner.* In the *Field* case, there was a double "string": the grantor's contingent reversion upon his surviving his two nieces, and his power to reduce or cancel the remainder interests.

The next question in both cases was whether the entire corpus, or only a part, was subject to tax. In the *Fidelity-Philadelphia* case, the Court refused to exclude the value of the life estates of the daughters.

Mr. Justice MURPHY says:

We are not concerned here with determining whether the values of any property interests or interven-

ing estates not affected by the decedent's death and not subject to the contingent power of appointment should be deducted from the value of the corpus. The value of the life estate retained by the decedent obviously cannot be deducted. And the life estates of the daughters and the remainder interests of their surviving descendants were all subject to divestment by the contingent power of appointment and were freed from this contingency only at or after the decedent's death. There is thus no basis for deducting their values as suggested by petitioner.

It is difficult to see how the life estates of the daughters were "subject to divestment by the contingent power of appointment," since that power could take effect only after the death of the daughters. These life estates were subject to divestment only by the daughters' deaths before the termination of the decedent's life estate. If *May* v. *Heiner* is still the law, the mere existence of a life estate in a pre-1931 trust is not an estate tax factor, and it seems paradoxical to impose a tax on account of the possibility that a succeeding life estate will never commence because of the grantor's prior life estate. Nevertheless, the opinion seems to indicate that a life estate would be excluded if it were not subject to a prior life estate in the grantor.

In the *Field* case, the Court likewise rejected the contention that the value of the trust during the remaining life expectancy of the two nieces was to be excluded. It was pointed out that disposition of the entire trust corpus was subject to a possible reversion, which was terminated by the grantor's death, and that the entire corpus was therefore subject to tax.

The *Fidelity-Philadelphia* case was argued by Mr. C. Russell Phillips for the Trust Company, et al., and by Mr. L. W. Post for Rothensies.

The *Field* case was argued by Mr. L. W. Post for the Commissioner of Internal Revenue and by Mr. Edgar J. Bernheimer for Estate of Field, deceased.

Insurance — Conflict of Laws — Full Faith and Credit.

The refusal of Wisconsin to permit an Illinois mutual insurance company to sell insurance on the mutual plan, without complying with the requirements of the Wisconsin statutes in regard to the creating of insurance reserves, does not offend against the due process clause or the like faith and credit clause of the Constitution.

Whether the action of Wisconsin offended against the commerce clause of the Constitution was not decided because it was not and could not have been passed upon by the Wisconsin court.

State Farm Mutual Automobile Insurance Co. v. *Duel*, 89 L. ed. Adv. Ops. 548; 65 Sup. Ct. Rep. 573; U. S. Law Week 4202. (No. 115, argued January 12, decided February 12, 1945).

In 1943 a Wisconsin statute provided that in the computation of the unearned premiums or insurance reserves to insure payment of Wisconsin policies there should be included not only the premium but the membership fees of mutual insurance companies.

The insurance commissioner of Wisconsin refused an Illinois Mutual Assurance Company a license in 1942 and 1943 for failure to comply with the statute. That company brought suit to enjoin the Commissioner from interfering with its business and to require him to issue a license.

In addition to its Illinois business, the Company has been doing business in Wisconsin since 1939 and had been selling automobile insurance on the mutual plan. Its members were charged a membership fee in addition to the premium. In Illinois, the state of its creation, the membership fee was not required to be included in the computation of its premiums, but Wisconsin took a different view. In the suit so brought by the Illinois company against the Wisconsin commissioner in the Wisconsin court, it was held on final appeal that the membership fees were properly classified as premiums and the action of the commissioner, holding that the statute above referred to did not contravene the constitutional rights of the Illinois company, was sustained.

The case went to the Supreme Court of the United States by direct appeal and it was held that the statute did not violate the due process clause of the Fourteenth Amendment or the full faith and credit clause of the Federal Constitution, and the judgment of the Wisconsin court was affirmed.

The opinion of the Court was delivered by Mr. Justice DOUGLAS.

In justification of the position of the Wisconsin commissioner and the Wisconsin court, Mr. Justice DOUGLAS says:

Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens. The reserve which it requires under §201.18 is designed to measure the entire future contingent liability on unexpired risks. That contingent liability is obviously relevant in any appraisal of the financial soundness and stability of the company.

* * *

. . . Their inclusion does not mean that out-of-state activities are being regulated by Wisconsin. It only means that solvency of a multistate business can hardly be determined on a single state basis. . . . If a state undertook to regulate out-of-state activities through such a requirement, different questions would be posed. But we fail to see that Wisconsin has done that here.

In regard to the claim that the statute violated the full faith and credit clause, it was said:

Little need be said in reply to the contention that the Wisconsin statute as construed and applied violates the full faith and credit provision of the Constitution. Appellant's argument comes down to this: Illinois, the state of incorporation, does not treat the membership fees as a part of the premiums. Therefore, Wisconsin may not do so. The result would be that no

State could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation. The full faith and credit provision requires no such result.

It was further claimed by the Illinois company that the Wisconsin statute violated the commerce clause of the Constitution. That question was not raised below. It emerged after the jurisdictional statement had been filed in the Supreme Court and thereafter the Court decided the *South-Eastern Underwriters* case, holding that fire insurance business was commerce within the meaning of the commerce clause and the Sherman Act. Since that pronouncement became known after the case had been brought to the Supreme Court and there had been no opportunity for the Wisconsin Supreme Court to have considered it, it was held that the Illinois company was not foreclosed under Wisconsin procedure from obtaining a determination in the Wisconsin courts of the commerce clause question. Mr. Justice ROBERTS dissented without opinion.

Mr. Justice JACKSON said that he thought the judgment below should be vacated rather than affirmed.

The case was argued by Mr. R. M. Rieser and Mr. Barnabas F. Sears for State Farm Mutual Automobile Insurance Company and by Mr. Harold H. Persons for Duel.

Full Faith and Credit Clause—Public Utilities—Natural Gas Act—Jurisdiction of Federal Courts.

Central States Electric Co. v. *City of Muscatine, Iowa,* 89 L. ed. Adv. Ops. 540; 65 Sup. Ct. Rep. 565; U. S. Law Week 4204. (No. 85, argued December 8, 1944, decided February 12, 1945).

An earlier phase of this case came before the Court in *Federal Power Commission* v. *Natural Pipeline Co.*, 315 U. S. 575, (28 A.B.A.J. 348). We deal here only with the disposition of the moneys deposited in court awaiting the final decision as to the validity of the rate reduction order and the distribution of the deposits.

Here the ultimate question in dispute was to whom the money deposited in court should be paid. It was claimed by the Central States Electric Company, the public utility company which purchased the natural gas at wholesale from the Pipeline Company and supplied it to the consumers. It was also claimed by the municipal authorities in the interest of the ultimate consumers.

The lower court denied the petition of Central on the ground that the federal courts had no jurisdiction to "determine the reasonableness of petitioner's rates" and in a separate order denied payment to Muscatine and other Iowa cities. That order was reversed and the case remanded.

Mr. Justice ROBERTS delivered the opinion of the Court.

The opinion first takes up the extent to which the order of the lower court was correct. As to that Mr. Justice ROBERTS says:

> *The court below was right in its view that as a federal court it had no power, at least in the absence of federal legislation purporting to confer such power upon it, to fix or adjust Central's rates, that being a legislative function of the State of Iowa. . . . The court below so held in this case.*
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> * * *
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> *The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity.*

Pointing out the practical difficulties, lack of information as to questions of fact and absence of proof of the procedural and substantive laws of Iowa, Mr. Justice ROBERTS says:

> *We are of opinion that the court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute.*

Passing finally to the consideration of the particulars in which the Court found error in the order of the lower court, Mr. Justice ROBERTS says:

> *The ultimate consumers' rights being such as the law of Iowa affords, there is no reason for the payment of the fund to municipalities or municipal officers under a quasi trust for those found ultimately entitled, . . . The most the court below should do, . . . is to order that the fund be held for a reasonable time to permit interested persons to litigate the issue in a tribunal having jurisdiction, the order to be conditioned that if such litigation is not instituted within a reasonable time, and prosecuted to final adjudication, the fund shall be paid over to Central, and that if it be adjudged, as a result of such litigation that Central is indebted to its consumers because of the reduction of wholesale rates in this proceeding, further application may be made to the court as to its disposition.*

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice MURPHY and Mr. Justice RUTLEDGE concurred.

Mr. Justice BLACK says:

> *Until today, this Court seems never to have doubted that "it is a power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process'."*
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> * * *
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> *The injury to the consumers here did not stem from state law or the action of a state court; it was the direct result of stay orders made by a federal court. These orders, which permitted the Pipeline Company to continue to charge rates which the Commission had determined to be excessive, to the detriment of ultimate consumers, were issued under the provisions of the Natural Gas Act. The injuries here were therefore occasioned by the application of federal law in a federal court, and raised federal, and not state law questions. For a federal court to remedy this injury*

by affording that protection to consumers which the act contemplated, cannot, in my judgment, be said to amount to a regulation of local gas rates.

Mr. Justice DOUGLAS delivered a separate dissenting opinion in which he declares his belief that the disposition of the fund in the possession of the court "is to be determined by state law" but that the federal court having possession of the fund "has considerable discretion in its management." He expressed his belief that "the court below selected the most equitable and just method of rectifying the injury done by the stay order".

The case was argued by Mr. Perry M. Chadwick for the Central States Electric Company and by Mr. Charles V. Shannon for the City of Muscatine.

Taxation — Processing Tax Refund — Effect of Statutory Presumption

In determining whether the taxpayer has absorbed the processing tax for the purpose of a refund, the Tax Court must weigh the taxpayer's "margin" evidence against any countervailing evidence submitted by the Commissioner.

Webre Steib Co. v. *Commissioner of Internal Revenue*, 89 L. ed. Adv. Ops. 553; 65 Sup. Ct. Rep. 578; U. S. Law Week 4199. (No. 148, argued December 13, 1944, decided February 12, 1945).

This is a proceeding brought for recovery of sugar processing taxes paid under the Agricultural Adjustment Act of 1933. The Commissioner having denied in entirety the taxpayer's claim for $8,169.97, the total tax paid by it, taxpayer petitioned for review by the Processing Tax Board of Review, as provided by statute. 49 Stat. 1749. The Board awarded refund in the amount of $3,655.82, and motions for rehearing made by both parties were denied by the Tax Court, which had succeeded to the jurisdiction of the Processing Tax Board of Review. 56 Stat. 798. On appeal, the Court of Appeals for the Fifth Circuit reversed and held that the claim should be denied. 140 F. 2d 768. The case was accepted to review questions of application of the "prima facie evidence" and "presumption" sections of Title VII, Revenue Act of 1936, on which there was conflict in the circuits.

The taxpayer relied upon the fact that the "margin" between cost and gross sales value was lower during the tax period in question than during the "base period" prescribed by the statute for the purpose of comparison. The government relied upon evidence of universal increases in selling price for the effective date of the tax, and upon evidence that the taxpayer had separately itemized the tax in statements to its broker. The refund was allowed on the amount shown by the margin differences. The reversal by the court of appeals was based upon the conclusion that this presumption had been "dissolved" by the government's evidence.

The cause was remanded to the Tax Court in an opinion by Mr. Justice JACKSON. Two major issues were considered: (1) whether the Board was entitled to base an award upon the statutory "prima facie evidence" or "presumption", or whether the government's evidence removed the presumption from the case as a matter of law; and (2) whether, with the presumption out of the case, there was evidence from which the Tax Court would be entitled to award a refund to petitioner in any amount.

On the first issue, the opinion noted that "although the Board did not state how it arrived at its award, it seems likely that it relied upon the prima facie evidence provisions and not upon a weighing of the evidence." The Court acknowledged that, in view of the statutory history, margin evidence is conclusive in the absence of other evidence. Moreover, the Court expressed doubt as to the government's contention that a rebuttable presumption never operates to shift the burden of proof. Nevertheless, it was stated that under the particular statute there was "nothing to indicate that Congress attached exceptional probative value to the margin evidence, or that it desired for any other reason to tilt the scales sharply against the Commissioner rather than merely to even them somewhat in behalf of claimants." The evidence in question, the Court noted, was of the type expressly recognized by the statute. Therefore, it was held that the presumption as such became inoperative once such evidence was introduced by the Commissioner. In addition, it was held that the evidence in this case was such as to overcome the presumption with respect to the entire amount of the margin. Incidentally, it should be noted that the Court expressly refrained from an interpretation of the presumption where it is the taxpayer who seeks to overcome the effect of margin differences.

The second issue apparently presented more difficulty. First, the Court stated that "the margin evidence remained in the case for whatever it might be worth apart from the presumption." Then, the point was made that this evidence had "some logical tendency" to establish that the burden of the tax was borne by the taxpayer. Finally, the Court noted that the government's evidence was not "so conclusive as to deprive the margin evidence of all significance":

It permits but does not require a finding that petitioner had a uniform practice of billing the tax as a separate item. Even though such a practice be inferred, there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the effort to shift the tax. The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell; (See Johnson, AAA Refunds: A Study in Tax Incidence (1937) 37 Col. L. Rev. 910,) the inquiry is at best a difficult one. But we do not think it can be said that the record is devoid of rational support for a finding that petitioner absorbed some of the tax.

Accordingly we must remand the case to the Tax Court for a weighing of the evidence, including, of course, such further evidence as that court may think it proper to receive in view of the way in which the case has been tried. In doing so we intimate no opinion, of course, as to whether petitioner has sustained the burden of proof placed upon it by the statute.

This statement, and especially the citation of the law review article, seem to indicate that both the objective "margin" test and the subjective "representation" test are susceptible of interpretation in light of the supply and demand factors which determine price under the particular economic circumstances.

A subordinate issue in the case was the use of margin evidence during a period more than six months after the tax period. The taxpayer sought the acceptance of such evidence, on the ground that it had done no business during the six month period recognized by the statute. This evidence had been rejected by the Board. The Court held that such evidence was not acceptable as part of the "presumption", but that it was admissable as evidence of the actual extent to which the tax had been absorbed.

Mr. Justice RUTLEDGE dissented, in an opinion in which Mr. Justice BLACK joined. The dissent contended that the Board decision should be affirmed, on the ground that it might "reasonably be considered" to have been arrived at on the weight of the evidence submitted. The dissent contended also that the margin evidence for the later period should be inadmissible.

The case was argued by Mr. D. J. Batter and Mr. William A. Sutherland for Steib Co. and by Miss Helen R. Carloss for Commissioner of Internal Revenue.

Taxation—Gross Income—Employee's Exercise of Stock Purchase Option

Where an employer grants an option to an employee to purchase stock at some future time, and where the excess of value over the option price is intended as future compensation, that excess at the time of exercise is taxable as ordinary income to the employee.

Com'r of Internal Revenue v. *Smith*, 89 L. ed. Adv. Ops. 569; 65 Sup. Ct. Rep. 591; U. S. Law Week 4229. (No. 371, argued January 30 and 31, decided February 26, 1945).

The taxpayer was an employee of X Corp., which was engaged in rehabilitating Y Corp., under an agreement whereby X Corp. would receive a block of Y stock under certain circumstances. X Corp. gave the taxpayer an option to purchase part of this stock, if and when X Corp. obtained it. The option price at this time was lower than the value of the stock. In a later year X Corp. obtained the Y stock, and the taxpayer exercised his option. At the time of exercise, the value of the stock was in excess of the option price. The Tax Court held that this excess was "compensation", taxable as ordinary income at the time of exercise. The court of appeals reversed, on the ground that there was no evidence that the stock was issued as compensation (142 F (2d) 818).

In an opinion by Mr. Chief Justice STONE, the decision of the Tax Court was affirmed, and the judgment of the court of appeals was reversed.

The opinion relies upon two facts in the case: (1) the option could not have been exercised at the time it was given, because the employer did not yet own the stock; and (2) the option price was then higher than the value of the stock. On the basis of these facts, the Court concluded that the option was intended to be compensation at such subsequent time as it was actually exercised. The opinion seems to indicate, however, that the result might be the same if only the second factor were present. On the other hand, there is some indication that the option would be immediately taxable, and that no further tax would be incurred upon exercise, if the option price were lower than the value of the stock at the time the option was granted:

And as the option was not found to have any market value when given, it could not itself operate to compensate respondent. It could do so only as it might be the means of securing the transfer of the shares of stock from the employer to the employee at a price less than their market value, or possibly, which we do not decide, as the option might be sold when that disparity in value existed. Hence the compensation for respondent's services, which the parties contemplated, plainly was not confined to the mere delivery to respondent of an option of no present value, but included the compensation obtainable by the exercise of the option given for that purpose. It of course does not follow that in other circumstances not here present the option itself, rather than the proceeds of its exercise, could not be found to be the only intended compensation.

The Tax Court thus found that the option was given to respondent as compensation for services, and implicitly that the compensation referred to was the excess in value of the shares of stock over the option price whenever the option was exercised. From these facts it concluded that the compensation was taxable as such by the provisions of the applicable Revenue Acts and regulations. We find no basis for disturbing its findings, and we conclude it correctly applied the law to the facts found.

Mr. Justice ROBERTS dissented for the reasons stated by the court of appeals.

The case was argued by Mr. J. Lewis Monarch for Internal Revenue and by Mr. Clarence D. Phillips for Smith.

Taxation—Constitutionality—Classification of Property

A different method of state assessment of property within a certain classification is not a denial of equal protection under the Fourteenth Amendment.

Charleston Federal Savings and Loan Association v. *Alderson*, 89 L. ed. Adv. Ops. 621; 65 Sup. Ct. Rep. 624; U. S. Law Week 4230 (No. 400, argued February 7, decided February 26, 1945).

The complaining taxpayers were Federal Savings and Loan Association and a State Building and Loan Association whose intangible property was assessed by the State Tax Commission at one hundred per cent, whereas other types of intangible property not owned by these taxpayers, and which the State Constitution included in the same classification for certain taxing purposes, were assessed at less than one hundred per cent. Among these other intangibles were bonds, notes and accounts receivable at seventy per cent, installment accounts at sixty-five per cent and accounts receivable of small loan companies at eighty-five per cent.

The state court decision sustaining the tax was upheld in an opinion by Mr. Chief Justice STONE. It was held that the Fourteenth Amendment is no bar to the differentiating by state taxing officials between different types of properties assessed by them, even though they are placed in the same classification by the State Constitution. However, there must be some logical and actual reason for such differentiation. Thus, as in this case, where the property is the highly secured intangible assets of a Building and Loan Association whose business is strictly regulated by a state, such intangibles may be assessed at a higher percentage of their book value than intangibles of other types of business such as small loan companies. It was pointed out that such small loan companies were not as strictly regulated by the state nor did their assets have as much security. The fact was also brought out that the business of Savings and Loan Associations involves a smaller degree of risk than that of small loan companies.

Before the Fourteenth Amendment can be availed of, the Supreme Court firmly places on a complaining taxpayer the burden of proving that his property is actually worth less than the value fixed for taxation purposes; where such taxpayer claims that another taxpayer has property which has been assessed at a lower and discriminatory rate, it must be proved that the property of the other taxpayer is worth more than the amount at which it has been assessed. In this case neither of these facts was found to be established.

The decision in this case permits a different rate of assessment of a class of property within a certain class when such difference is based on some actual and logical reason for different treatment in the assessment of such property within the entire class.

Mr. Justice BLACK concurred on the ground that no substantial federal question was presented.

Mr. Justice ROBERTS dissented on the ground that the facts clearly showed an intended and actual discrimination.

The case was argued by Mr. J. Campbell Palmer, III, for Savings & Loan Association and by Mr. Kenneth E. Hines for Alderson.

Taxation—Gift Tax—Transfer under Antenuptial Agreement

A transfer to the taxpayer's intended wife to compensate her for loss of income from trusts constitutes taxable gift since not made for an adequate and full consideration in money or money's worth.

Commissioner of Internal Revenue v. *Wemyss*, 89 L. ed. Adv. Ops. 654; 65 Sup. Ct. Rep. 652; U. S. Law Week 4238. (No. 629, argued January 9, decided March 5, 1945).

Under the terms of two trusts created by her deceased husband a widow was entitled to one-half of the income and the balance of the income was payable to her child. In the event of the widow's remarriage her share of the income became also payable to the child. The taxpayer and the widow were contemplating marriage and to compensate her for the prospective loss of income from the trusts the taxpayer and his intended wife entered into an agreement in 1939 whereby he transferred certain shares of stock to her. Shortly thereafter they were married. The Commissioner held that the transfer of stock was subject to gift tax and assessed a deficiency. The Tax Court upheld the Commissioner's determination (2 T.C. 876) but the Circuit Court of Appeals reversed (144 F (2d) 78).

In an opinion written by Mr. Justice FRANKFURTER, the Supreme Court reversed the decision of the Circuit Court. The decision turned upon the question of whether the transfer of the stock had been made for "an adequate and full consideration in money or money's worth" so as to remove the gift from the scope of Sec. 503 of the Revenue Act of 1932. This section provided that where property is transferred for less than such a consideration, the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift.

The opinion reexamines the view expressed by the Tax Court that "consideration" as employed in Sec. 503 was not to be interpreted in the light of common law notions of "consideration", that marriage would not satisfy the requirement of Sec. 503 since it was not a consideration reducible to money value, and alternatively that no consideration flowed to the taxpayer from his intended wife's relinquishment of her trust income. It then refers to the view of the Circuit Court that no taxable gift had been made since the marriage agreement constituted an arm's length bargain lacking in donative intent.

The Court held that Sec. 501, which imposes a tax upon transfers of property by gift must be read together with Sec. 503. The test formulated by Congress therein was not one of "donative intent", but rather one of whether property is transferred for less than an adequate and full consideration in money or money's worth. The Treasury Regulations have given further expression to this Congressional intent, by viewing a transfer not made in the ordinary course of business as subject to gift tax to the extent that it is not made "for an adequate and full consideration in money or money's worth".

Mr. Justice FRANKFURTER then gives new sanctity to the conclusiveness of the findings of the Tax Court by stating:

The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justifiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in Dobson v. Commissioner, *320 U.S. 489,* Commissioner v. Heininger, *320 U.S. 467,* Commissioner v. Scottish American Co., *323 U.S. 119.*

The view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift is also approved. Even though the Revenue Act of 1932 does not specifically require a benefit to the donor in order to relieve a transfer by him from being a gift, Mr. Justice FRANKFURTER finds no significance in this omission and points out that to allow detriment to the donee to satisfy the requirement of "adequate and full consideration" would open the door to evasion of the tax.

Mr. Justice ROBERTS dissented without opinion.

The case was argued by Miss Helen R. Carloss for the Commissioner and by Mr. Cecil Sims for Wemyss.

Taxation—Gift Tax—Transfer in Consideration of Release of Marital Rights in Antenuptial Agreement

A transfer in trust for the benefit of the taxpayer's wife pursuant to antenuptial agreement, whereby wife surrendered all marital rights in husband's estate, does not constitute a transfer for an adequate and full consideration so as to exempt the transfer from gift tax.

Merrill v. *Fahs,* 89 L. ed. Adv. Ops. 657; 65 Sup. Ct. Rep. 655; U. S. Law Week 4239. (No. 126, argued January 9, decided March 5, 1945).

This case was a companion case to *Commissioner* v. *Wemyss,* decided the same day and reviewed above. The taxpayer, who was a man of large resources, entered into an agreement the day before his marriage whereby he agreed to set up an irrevocable trust for his intended wife within 90 days after their marriage and to provide two additional trusts by his will, each in the amount of $300,000. The prospective wife in turn released all rights that she as wife or widow might acquire in the taxpayer's property. Under the laws of Florida, where the agreement was made, a wife has an inchoate interest in all of her husband's property, and such an antenuptial agreement is enforcible. Subsequent to their marriage the parties carried out the agreement in full. Taxpayer reported the gift on a gift tax return but claimed no tax was due. The Commissioner determined a deficiency which taxpayer paid. A claim for refund was filed and rejected and suit was brought in the District Court. That Court sustained the taxpayer (51 F. Supp. 120) but the Circuit Court of Appeals reversed (142 F. (2d) 651).

The Supreme Court, with four justices dissenting, affirms the holding of the Circuit Court that a taxable gift had been made by the husband. Mr. Justice FRANKFURTER opens his opinion for the majority by pointing out that the case does not come up from the Tax Court and "No aid can therefore be drawn from a prior determination by the tribunal specially entrusted with tax adjudications." He also points out that here, as in the *Wemyss* case, the application of Section 503 of the Revenue Act of 1932 is in issue and the decision must turn on whether the relinquishment by the wife of her marital rights constituted "adequate and full consideration in money or money's worth" for the transfer by the husband.

Basing his views upon the construction of a like phrase in the estate tax law and the historical origination of the phrase, Mr. Justice FRANKFURTER finds that the release of marital rights does not furnish "adequate and full consideration in money or money's worth". He points out that the quoted phrase came into the gift tax law from the estate tax law; that originally the estate tax law had provided for the inclusion in the gross estate of transfers in contemplation of or intended to take effect at death except "a bona fide sale for a fair consideration in money or money's worth"; that the courts proceeded to hold that "fair consideration" included relinquishment of dower rights; that Congress was thus led in the Revenue Act of 1926 to substitute the words "adequate and full consideration" in order to narrow the scope of the exemption; and that when the present gift tax law was enacted in 1932 the same restrictive phrase was used.

The fact that in the 1932 Act Congress specifically provided that for estate tax purposes the release of marital rights shall not constitute "consideration in money or money's worth", and omitted any such provision from the gift tax law, is found to be of no particular significance. The opinion states:

> *Plainly, the explicitness was one of cautious redundancy to prevent "subversion of the legislative intent." Without this specific provision, Congress undoubtedly intended the requirement of "adequate and fair consideration" to exclude relinquishment of dower and other marital rights with respect to the estate tax.*

Mr. Justice ROBERTS dissented without opinion and Mr. Justice REED wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined. Mr. Justice REED takes the view of the District Court that since the present value of the rights in her husband's estate which the wife surrendered far exceeded the amount transferred by the husband and since the transactions were made in good faith for business reasons and not to evade or avoid taxes, they fall within the scope of the Treasury Regulations which provide that a transfer "made in the

ordinary course of business (a transaction which is *bona fide* at arm's length, and free from any donative intent)" will be considered as made for an adequate and full consideration in money or money's worth. The dissenting opinion finds significance in the omission from the gift tax provisions of the Revenue Act of 1932 of any provision barring a relinquishment of marital rights as adequate consideration for a transfer.

The case was argued by Messrs, Sam R. Marks and Harry T. Gray for Merrill and by Miss Helen R. Carloss for the Collector.

Eminent Domain—Appellate Procedure—Final Judgment

In an action for the taking of private property by the Government for war purposes, orders and judgments under the authority of the Declaration of Taking Act that the Government is vested with the title of the property and that the owners are vested with the right of just compensation, are not "final judgments" and are not reviewable as such.

Catlin v. *United States*, 89 L. ed. Adv. Ops. 612; 65 Sup. Ct. Rep. 631; U. S. Law Week 4211. (No. 419, argued February 1 and 2, decided February 26, 1945).

March 31, 1942, pursuant to the War Purposes Act of 1917, a petition for condemnation of certain land was filed in a district court. On the same day an ex parte order for immediate possession was entered, pursuant to provisions of the Declaration of Taking Act, and the Secretary of War deposited in court the amount estimated by the Government as sufficient for the payment of just compensation of the owners. The court thereupon entered an order, also ex parte, that the title of the property was vested in the United States, and that the right of just compensation was vested in the persons entitled thereto and that the cause be held for further disposition.

Thereafter, on August 2, 1943, an order was entered for service by publication and in October following Catlin and others as trustees of one of the tracts moved to vacate the judgment and dismiss the petition as to their property. After this the Government amended its petition and the trustees filed an amended motion to vacate and dismiss, which the court denied. From that order and the "judgment" above referred to, the trustees appealed to the Circuit Court of Appeals, Seventh Circuit. That court held that the orders and judgment were not final and dismissed the appeal. Certiorari was allowed, to resolve conflict among the circuit courts on this question, and the judgment of that court was affirmed.

Mr. Justice RUTLEDGE delivered the opinion of the Court. After defining the question involved, he declares that "the judgment was right." He points out that the property owners' motions raised issues grounded on a contention that the taking was not for a purpose authorized by the War Purposes Act and that, therefore, with that issue undisposed of by the denial of the motion to dismiss, the judgment was not final. Many cases are cited and analyzed and the conflict of decision in the Circuit Court discussed. In the application of those cases to the one before the Court, Mr. Justice RUTLEDGE says:

> *Their right to appeal rests upon Section 128 of the Judicial Code. This limits review to "final decisions" in the District Court. A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. . . . Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property.*
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> * * *
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> *The foundation of this policy is not in merely technical conceptions of "finality." It is one against piecemeal litigation. "The case is not to be sent up in fragments. . . ." . . . Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.*

The conclusion thus reached is buttressed by the War Purposes Act. As to this point Mr. Justice RUTLEDGE says:

> *Furthermore, the 1917 act contemplated emergency action, to the extent that upon the filing of the petition immediate possession might be taken and the lands occupied "for military purposes" during war "or the imminence thereof." This purpose, it seems clear, would be largely defeated, if entry must be deferred until specific challenges to jurisdiction and the sufficiency of the petition are determined seriatim, not only by ruling of the trial court but by separate appeals from each ruling which, if sustained, would end the litigation, but if lacking in merit could only prolong it.*

Enlightenment is drawn from an examination of the Declaration of Taking Act, its declared purpose and phrasecology:

> *We think the purpose was to leave intact the owner's remedy existing before the statute was adopted. For one thing, the statute is not an independent one for condemnation. It provides for no new condemnation proceeding. It merely affords steps ancillary or incidental to suits brought under other statutes; and was so used in this case in conjunction with the suit brought under the Act of 1917. Its declared purpose is to expedite, in the cases to which it applies, the construction of public buildings and works "by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain," . . . as the title states, and it applies to "any proceeding . . . instituted . . . under the authority of the United States for the acquisition of any land . . . for the public use. . . ." Section 1.*

Mr. Justice ROBERTS and Mr. Justice DOUGLAS concurred in the result.

The case was argued by Mr. Ralph F. Fuchs for Catlin and by Mr. Thomas S. McPhesters, Mr.

Henry Davis and Mr. George D. Burroughs for the United States.

Fair Labor Standards Act—Power to Fix Minimum Wages—Prohibition of Homework.

Under Section 8 (f) of the Fair Labor Standards Act, the Wages and Hour Administrator has power to prohibit homework in an industry where prohibition thereof is essential to achieve the purpose of the Act to prevent the circumvention or evasion of an order prescribing minimum wages for the industry.

Gemsco, et al. v. *United States; Maretzo et al.* v. *United States; Guiseppi, et al.* v. *United States,* 89 L. ed. Adv. Ops. 593; 65 Sup. Ct. Rep. 605; U. S. Law Week 4214. (Nos. 368-370, argued December 5, 1944, decided February 26, 1945).

The question for decision in these cases was whether the Administrator of the Wage and Hour Division has authority under Section 8 (f) of the Fair Labor Standards Act to prohibit industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. The Circuit Court of Appeals sustained an order of the Administrator which prescribed a minimum wage rate of 40c an hour and which prohibited homework as necessary (in the sense of being absolutely essential) to achieve the purposes of the Act. The provision of the statute relied on to support the prohibition is found in Section 8 (f), which reads:

> (f) *Orders issued under this section* shall define the industries and classifications therein to which they are to apply, and *shall contain such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.* No such order shall take effect until after due notice is given . . . (Emphasis added)

On certiorari the Supreme Court affirmed the ruling of the Circuit Court of Appeals, in an opinion by Mr. Justice RUTLEDGE. The scope of the issue presented is narrowly defined as appears from the following portion of the opinion:

Respondent says that this authorizes him to take whatever action he finds necessary to prevent circumvention or evasion of the order so that the wage rate it establishes may be safeguarded; and that in this case his findings, amply sustained by the evidence, show prohibition of industrial homework is necessary to accomplish this end. As applied in this case, he has construed "necessary" not as meaning "helpful," "consistent," or "convenient," but as connoting that the prohibition is absolutely essential to achieve those purposes. He says the wage rate cannot be maintained unless industrial homework is prohibited, with the comparatively minor exceptions the order allows. His findings and indeed his express conclusions therefore necessarily determine that regulation, by measures short of prohibition, cannot accomplish the relevant purposes of the order and of the statute.

Petitioners do not dispute the Administrator's findings of fact or that the evidence fully sustains them. Nor indeed do they question his conclusions in any respect except that he has no legal authority to make the prohibition. The petition for certiorari conceded, as does also the brief, that the prohibition was included solely because respondent found "he could not [otherwise] enforce the minimum wage rate as to the home workers employed in the industry." The brief states further that petitioners, "during the entire course of the proceedings, . . . challenged only the statutory authority" of the respondent to include the prohibition.

In this sharply chiseled state of the issue, the accuracy of the Administrator's findings and conclusions and the sufficiency of the evidence to sustain them must be taken not only as true but as conceded, apart from the single question of authority to include the prohibition notwithstanding it is so buttressed in fact. The posture of the case therefore compels acceptance of the Administrator's position that, without the prohibition, the wage rate cannot be maintained, and that circumvention and evasion cannot be prevented.

Furthermore, upon the findings that is true not only with reference to the employees who are themselves homeworkers. It is true also as to all other employees in the industry. According to the best available estimates, the number of homeworkers at peak employment (April 1, 1939, to July 15, 1942) ranged from 8,500 to 12,000, whereas the number of factory workers as of June, 1942, was 18,500. The number of wage earners per factory in 1939 employed in some 1,431 establishments averaged between 12 and 13 workers. Not only therefore is it impossible for the Administrator, without the prohibition, to follow the statute's mandate [Section 8(d)] to "carry into effect" the recommendations of the committee as to 8,500 to 12,000 homeworkers, who generally are part-time pieceworkers. He neither can do so as to factory workers, who generally are full-time workers.

Hence, if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage.

The case therefore comes down squarely to whether or not minimum wages may be effectively prescribed and required in this industry. If homework can be prohibited, this is possible. If it cannot, the floor provided by the order cannot be maintained and, further, what is more important, it inevitably follows that no floor, whether of "statutory" or of "committee" wages, can be maintained.

In this light petitioners' position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in these terms. It comes to that. So to state it is to answer it. The industry is covered by the Act. This is not disputed. The intent of Congress was to provide the authorized minimum wage

for each employee so covered. Neither is this questioned. Yet it is said in substance that Congress at the same time intended to deprive the Administrator of the only means available to make its mandate effective. The construction sought would make the statute a dead letter for this industry.

The statute itself thus gives the answer. It does so in two ways, by necessity to avoid self-nullification and by its explicit terms. The necessity should be enough. But the Act's terms reinforce the necessity's teaching. Section 8(d) requires the Administrator to "carry into effect" the committee's approved recommendations. Section 8(f) commands him to include in the order "such terms and conditions" as he "finds necessary to carry out" its purposes. These duties are backed up by other provisions. When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter.

Dealing with and rejecting the contention that a prohibition is not a method of enforcement but rather a form of experimental social legislation, the opinion says in part:

When all of these facts are taken into account, the case is clearly not an instance of effort to achieve ends beyond or independent of the statutory objects. It rather exhibits but an exercise of the necessary means to accomplish those objects. This is confirmed, further, by the evidence and the findings which show that the prohibition will not eliminate the great majority of home-workers from the industry; but on the contrary will result only in transfer of the scene of their work from the home to the factory and will do this without undue hardship. For the larger number of workers unable to make the transfer, the exceptions allowed by the order will provide an adequate mode for permitting continuance of work at home.

The legislative history of the Act is also examined but the conclusion is reached that it does not support the position of those attacking the order.

Mr. Justice FRANKFURTER delivered a brief concurring opinion.

Mr. Justice ROBERTS delivered a dissenting opinion in which the CHIEF JUSTICE concurred. The dissenting opinion urges that the opinion of the Court construes the statute to embrace within its terms a grant of power to the Administrator which the legislative history seems to demonstrate the Congress purposely, and not by inadvertence, refused to confer. An analysis of the text of the statute and of its legislative history is set forth in support of the position taken by the dissenting Justices.

The cases were argued by Mr. Samuel S. Allan for Gemsco, Maretzo, and Guiseppi, and by Mr. Seymour D. Altmark and Mr. Archibalt Cox for the Government.

Public Vessels Act—Libel In Personam to Recover, in Admiralty, Damages Against the United States.

Canadian Aviator Ltd. v. *United States*, 89 L. ed. Adv. Ops. 585; 65 Sup. Ct. Rep. 639; U. S. Law Week 4222. (No. 279, argued January 5, decided February 26, 1945).

A Canadian corporation owned the steamship *Cavelier* which, while enroute from Canada to Jamaica, was ordered by United States Naval authorities to enter Delaware Bay. On approaching the Bay, the vessel received further orders that in her transit she was to follow directly astern of the patrol boat, *YP 249*, a public vessel of the United States. By following, as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage. The libel alleged that the collision with the wreck was due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her, and further that the owner elected to have its suit proceed in accordance with principles of libel *in personam* and *in rem*, and that in similar circumstances Canada allows nationals of the United States to sue in Canadian courts.

The District Court dismissed the libel on the ground that the accident was not caused by the negligent operation of the vessel and that the vessel was not the efficient cause of the accident, but that the accident arose from the personal and independent negligence of its officers.

The Circuit Court of Appeals affirmed on the theory that the words of the Act "caused by a public vessel" meant caused by those in charge of the vessel, with the vessel as the "noxious instrument," "the physical instrument," by which the damage was done, whereas in the instant case the physical cause was the submerged wreck.

The Circuit Court also ruled that the Act did not authorize recovery on the admiralty principles of *in rem* liability.

On certiorari the judgment was reversed by the Supreme Court, in an opinion by Mr. Justice REED.

The opinion states that the dismissal of the libel raises three questions for consideration: (1) Does the Public Vessels Act, 1925, authorize suit against the United States where the public vessel is not the physical cause, the "physical instrument," by which the damage is done; that is, is the Act confined to cases involving the collision situation? (2) If not, does the Act, which authorizes the filing of a libel *in personam* against the United States, authorize recovery in such suit on admiralty principles of *in rem* as well as *in personam* liability? (3) Finally, if the Act authorizes recovery on admiralty principles *in rem* and *in personam*, does petitioner's libel state a cause of action under those principles of admiralty law?

Answering the first question the opinion states that the lower court adopted too narrow a construction of the limits of relief provided by the Act.

The second question, the opinion also answers in the affirmative.

Finally, the Court also concludes that the libel stated a cause of action, and observes that it requires no extended citation of authority to show that where a tug negligently grounds its tow, the tug and its owner are liable for the damages resulting therefrom. The fact that the *Cavelier* was not fastened to the *YP 249* by a tow rope is irrelevent. Since it was averred that the *Cavelier* was under orders by Naval authorities to proceed directly astern of the *YP 249*, she was, for all practical purposes, as firmly fastened to the stern of the latter as if she had been in tow.

The case was argued by Mr. Eugene Underwood for Canadian Aviator and by Mr. Assistant Attorney General Shea for the Government.

DUMBARTON OAKS PROPOSALS

(Continued from page 183)

Oaks assayed the weaknesses of the League Covenant and tried to design a more perfect mechanism for preserving peace. In the first place, Chapter II of the Proposals states that all members shall settle their disputes by peaceful means, and shall refrain from the threat or use of force in any manner inconsistent with the purposes of the Organization. The proposals do not employ the word "war," but instead they ban any use of force or threat of force for the purposes of aggression.

While the proposed Organization is to have a Security Council and a General Assembly, their functions do not over-lap as in the case of the League organs. The Security Organization is to have the primary responsibility for the maintenance of international peace and security (Proposals, Chap. VI, B, 1), and while any such matters are being dealt with by the Security Council, the Assembly should not on its own initiative make any recommendation in regard thereto (*ibid.* Chap. V, B, 1). Apparently, the Security Council could refer a matter to the Assembly if it felt that action by the latter would be more effective. Perhaps a useful precedent is found in the Assembly action in the Sino-Japanese affair.

Like the League Council, the Security Council is empowered to investigate any dispute, or any situation which *may* give rise to a dispute, and determine whether its continuance will endanger peace. Parties are obligated, as in the case of the League, to seek a peaceful solution, such as by negotiation, mediation, conciliation, arbitration, or judicial settlement. If the parties fail to settle the dispute themselves, they are bound to refer it to the Security Council, which must decide whether the dispute endangers peace, whether it should deal with the dispute, and whether it should *recommend* appropriate procedures or methods of adjustment. The Security Council should normally refer justiciable disputes to the International Court of Justice, and it may ask that Court for advice on legal questions (*ibid.* Chap. VIII, A, 1-6).

Thus far the procedure is essentially the same as that envisaged in the League Covenant. Here again the Council is not to deal with matters which by international law are within the jurisdiction of the State concerned (*ibid.* Chap. VIII, A, 7), but while the Covenant stated that this finding should be made by the Council (Covenant, Art. 15, 8), the Proposals do not provide how this question of jurisdiction is to be decided.

If failure to settle a dispute menaces peace, the Security Council should make recommendations or decide upon measures to maintain peace. It can determine what diplomatic, economic or other non-military measures should be employed to give effect to its decisions, and call upon members of the Organization to apply such measures—but there is no clear commitment for the members to apply them (*ibid.* Chap. VIII, B, 1-3) unless it is the general obligation to carry out the decisions of the Security Council (ibid., Chap. VI, B, 4).

If such measures are considered inadequate, the Security Council "should be empowered to take such action by air, naval or land forces as may be necessary to maintain or restore international peace and security" (*ibid.* Chap. VIII, B, 4). There is added the requirement that members are to undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements concluded among themselves, armed forces, facilities and assistance necessary for the purpose of maintaining international peace and security. The special agreement or agreements are to be negotiated as soon as possible and should in each case be subject to approval by the Security Council and to ratification by the signatory States in accordance with their constitutional processes (*ibid.* Chap. VIII, B, 5).

Obviously, without such an agreement, and without adequate forces being actually placed at the disposal of the Security Council so that they can be brought immediately to bear against a potential aggressor, and without a commitment and willingness and determination to supply whatever additional force may be needed, the new Organization is not likely to be any more effective than the League of Nations was in the Sino-Japanese and subsequent debacles.

In short, some of the marked weaknesses in the machinery of the existing League that should be remedied in the proposed Organization are:

> (1) The rule of unanimity, which should be set aside so that none of the major powers could veto action against itself; (2) The making of mere recommendations to the several governments for action by their respective legislatures, which should be replaced by decisions immediately enforceable with economic and financial sanctions, and if necessary by adequate military sanctions.

The Section recommendations to remove these weaknesses by providing in the Charter that any party to a dispute should be heard but should not participate in a decision, and that Congress has the power to authorize in advance the use of military force necessary to fulfill our commitments under the Charter, were generally acclaimed.

Continuation of World Court Advocated

All the meetings favored continuing the Permanent Court of International Justice and making judges available to hold courts of specified original jurisdiction at the capitals of member Nations of the Organization. They also endorsed giving it compulsory jurisdiction over the following causes of legal disputes upon the application of any member of the Organization: The interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute the breach of an international obligation; and the nature and extent of the reparation to be made for the breach of an international obligation.

However, emphasis was placed on the establishing of an effective international organization to provide a backing for the Court and a sanction for its decisions. No one spoke on the manner of electing judges. One may recall the procedure suggested in the report relating to the Section recommendations adopted by the Association on September 13, 1944. The third resolution provided for convening promptly an "International Judicial Conference composed of jurists to conclude an International Judiciary Agreement" based on the Statute of the World Court, with such amendments as may be necessary, and to provide for the prompt organization and maintenance of the "International Judicial System."

The report suggested that judges of the World Court should be nominated by the highest national judicial tribunals in each country instead of by the members of the Permanent Court of Arbitration as is now provided. Furthermore, they should be elected by a Permanent International Judicial Conference composed of jurists, the voting power of the delegates to be adjusted according to the responsibility of Nations for the maintenance of peace. This could be done by having the Conference divided into two chambers, one composed of representatives of the Nations on the proposed Security Council, and the other of representatives of Nations in the General Assembly. A majority vote of both chambers should be required for the election of nominees.

THE NATIONS UNITED AT SAN FRANCISCO

(Continued from page 191)

heavy burdens of sorrow, anxiety, and loss. To that inevitable load, war adds a terror and a torture which the leadership of this day must plan to end and to forestall for the future, lest liberty and tolerable ways of life perish from this planet.

In our generation we have known not peace but the sword, in two World Wars. Our sons have known one war, but the bitterest and most diabolic in human history. We *must* cope with these things, this time, and not be dismayed by ancient failures.

"The thought still mounts." The Wisest who walked this earth declared that "blessed are the peace-makers." Great and wise men in all times have sought, and were wise and great because they sought, to draft and establish the means of maintaining peace and justice among Nations. In what we are trying to do now, we carry the hopes of our sons and daughters, and of their children, and of generations to come, for a decent, civilized world in which to live. But we also keep faith with the past and with our leaders of the past. Their voices speak to us as of old—Elihu Root and John Hay, William Howard Taft and Frank B. Kellogg, Woodrow Wilson and Wendell Willkie, John Bassett Moore and Charles Evans Hughes—all who have striven in other years to establish the ascendancy of law and the reign of peace among Nations. The organized Bar is but faithful to its long-time purpose, its ancient vigil.

Naturally and inevitably we pray that the statesmen of all the Nations at San Francisco shall help us on the path to greater tolerance, better mutual understanding, firmer resolve to do and accord right as it is given us to see the right.

It is a team-work effort for all of us. Men and women in all walks of life must help. Lawyers in all lands must speak out boldly, as they are accustomed to do, in behalf of law and courts and justice. Accomplishment cannot be left the concern of only a few. San Francisco will be a beginning, not the end, of the efforts for peace and law.

The mystic Lawrence of Arabia, in the last letter he wrote to his old classmate and biographer, Robert Graves, said what should be the keynote for this hour: "I have convinced myself that progress today is not made by a single genius, but by a common effort."

A great American lawyer, Abraham Lincoln, saw the same great truth, when he wrote, in a Message to the Congress, in a dark hour of another war:

> "We can succeed only by concert. . . . The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves."

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*The Legal Basis of Literary Censorship—"The Esquire Case—A Novel Extension of the Postmaster General's Powers of Classifying Mail"*: In the December issue of *The Virginia Law Review* (Vol. 31—No. 1; pages 83-118), Iredell Jenkins, Associate Professor of Philosophy at Tulane University, discusses in a highly useful manner the lively current subject of the legal basis for literary censorship under various types of legislation and regulations, with particular reference to the decision of the Massachusetts Court which upheld the Boston banning of *Strange Fruit* (*Commonwealth* v. *Isenstadt*, 3rd District Court, Eastern Middlesex County; April 20, 1944) and the decision of the United States District Court for the District of Columbia upholding the denial of the second-class mail rate in *Esquire, Inc.* v. *Walker*, 55 Fed. Supp. 1015.

Professor Jenkins regards both of these decisions as a serious threat to the liberal attitude toward artistic freedom which has prevailed in this country during at least the past thirty years. He urges that "we should take advantage of our present temper of artistic tolerance to objectify it in sound laws that will assure its preservation."

The author regards it as essential, in view of the decisions drifting back toward censorship, to rewrite forthwith both the "obscenity" and the mail-classification statutes in a more precise manner, so as to prevent their being so variantly interpreted by courts and by executive officers, on a basis more of personalities than of laws.

The legal implications of the decision in the *Esquire* case were discussed at length also in an editorial note in the September issue of *The Yale Law Journal* (Vol. 53—No. 4; pages 733-757). Both the article and the note will be of interest and use to lawyers who have clients in the publishing field. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25. Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

ATTORNEY AND CLIENT—*"Attorneys' Liens in Massachusetts"*: The November issue of *The Boston University Law Review* (Vol. XXIV-No. 4; pages 224-248) contained an article by George K. Black, of the Boston Bar, as to the nature and extent of attorneys' possessory and charging liens under Massachusetts law. The author treats specifically the problem of attorneys' liens against executors and administrators, and against fiduciaries generally, in the light of the decisions in other States. Apparently the article has been a factor in the introduction and serious consideration of amendatory legislation in Massachusetts, to increase the attorney's statutory fee of $2.50 and also enlarge the scope of the attorney's statutory lien. A further article, to appear in the *Law Society Journal*, will show the need for substituting "a reasonable attorney's fee" for the amounts now fixed and limited by statute. (For the present article, address: Boston University Law Review, 11 Ashburton Place, Boston, Mass.; price for a single copy: 70 cents).

CONFLICT OF LAWS—*"The Place of Wrong: A Study in the Method of Case Law"*: In the December issue of the *Tulane Law Review* (Vol. XIX—No. 2; pages 165-199), Professor Max Rheinstein, of the University of Chicago Law School, concludes his discussion of the above-quoted subject. The first installment, in the October issue of the same magazine (Vol. XIX—No. 1; pages 4-31), was reviewed in 31 A.B.A.J. 45. The author traces the origin of the term "place of wrong" to the early jurisdictional struggle between the common-law courts and the admiralty courts. The wholesale transplantation of the term to tort "conflict of laws" problems is severely criticized as "lump concept thinking". His conclusion is that the localization of wrongs for different purposes should be based on a "jurisprudence of interests" which considers "the interests at stake in every particular problem in the light of the policy judgments prevailing in the community in question". (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.00).

CONFLICT OF LAWS—*Evidence—"Choice of Law Governing Proof"*: Professor Edmund M. Morgan of the Harvard Law School, in the leading article in the December issue of the *Harvard Law Review* (Vol. LVIII-No. 2; pages 153-195), expounded the choice of law governing proof under

Editor's Note:

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.*

the general "conflict of laws" rule that the law of the *locus contractus* or *delicti* governs matters of substance and that the law of the forum governs matters of procedure. After referring to the fact that the Restatement of Conflict of Laws does not reject the orthodox rule, Professor Morgan shows, by examining a variety of legal situations where the law of the *locus* and the law of the forum differ as to the nature and *quantum* of proof required to establish a particular cause of action, that there is need to frame an analytical definition of procedure and to rephrase the "conflict-of-laws" generalization about substance and procedure. In his opinion, it "should be frankly stated that (1) the law of the *locus* is to be applied to all matters of substance except where its application will violate the public policy of the forum; and that (2) the law of the *locus* is to be applied to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum." (Address: Harvard Law Review, Cambridge, Mass.; price for a single copy: 75 cents).

CONSTITUTIONAL LAW — *"Constitutionality of Peacetime Conscription:"* Teachers of law are sometimes charged with "ivory tower" writing, and with failure to come down into the arena where their fellow-lawyers are trying to formulate legislation or protect rights basic to our form of government. Such a comment could not be made as to Professor Harrop A. Freeman's tightly reasoned article in the December issue of the *Virginia Law Review* (Vol. 31—No. 1, pages 40-82). He does much more than amass the evidence that peacetime conscription is unconstitutional; he sets forth a program for military manpower in time of war and in time of peace, which he offers as both constitutional and effective. His treatment is essentially historical rather than sociological in its approach to the constitutional problem, although his awareness of the social arguments is evident at every turn, by his reference to books like *MacArthur on War* (1942) and Edmunds, *The Militarization of the United States*, as well as to articles in the *Infantry Journal* and the League of Nations *Armament Year Book*.

There will be those who feel that Professor Freeman devoted too much attention to the relationship of the conscientious objector to the draft. The noteworthy thing is not the space which he gives to this, but that in seven pages he is able to present so complete a historically documented and sympathetic treatment, and that an article which is not devoted primarily to this subject becomes an authoritative study of this important area of religious freedom. Within the four corners of this study will be found also an analysis of the present tendency of the Supreme Court to protect the individual rights even at the expense of some inconvenience to society and to insist on the subordination of the military to the civil power. Any lawyer who proposes to discuss conscription or any other area of government war power will be glad to have this presentation. (Address: Virginia Law Review, Charlottesville, Virginia; price for a single copy: $1.25).

CONTRACTS — *"Comparative Study of Termination Articles in Government War Contracts":* Adding further to the increasing material as to war contract termination, is the article in the January issue of the *Wisconsin Law Review* (Vol. 1945—No. 1; pages 41-62), by Erwin Esser Nemmers, USAAF, who has been assigned to Terminations since June of 1943. His exposition is directed "to an analysis of the comparative advantages and disadvantages of the various termination articles which the contractor may discover in his contract at the time of termination." (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents).

CORPORATIONS — *"Some Problems in Liquidation and Rehabilitation of Insurance Companies":* An editorial note by J. S. Loynd of Pittsburgh in the December issue of the *Virginia Law Review* (Vol. 31— No. 1; pages 190-202) gives an interesting commentary on state control over the affairs of insolvent insurance companies. The trend of more recent legislation is shown to be toward the "rehabilitation" of an embarrassed insurer, rather than "liquidation". This change is attributed to an increased efficiency of state supervision. Although he considers basic state supervision of insurance companies essential, the author suggests that an amendment of the National Bankruptcy Act to give to state insurance departments the advantages of its reorganization provisions, at their option, could solve many of the problems inherent in the reorganization of insurers doing business in more than one state. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.25).

COURTS — *International Law — "The Twenty-third Year of the Permanent Court of International Justice and Its Future":* Virtually a "must" for the reading of those who wish to be abreast of the paramount current problems of an international organization based on justice and law rather than the good-will, team-work and discretion of the heads of States, is the leading article, under the above-quoted title, in the January number, just received, of *The American Journal of International Law* (Vol. 39—No. 1; pages 1-12). Significantly, this is Judge Manley O. Hudson's twenty-third annual survey of the organization and work of the Permanent Court of International Justice. The series was begun in that journal in 1923 (Vol. 17—No. 1; page 15).

The present chronicle is factual in the present tense, and therefore timely and useful. It shows that the Court as an institution is in existence and "in a position to resume its activity if and when the world position may permit". The premises of the Court in the Peace Palace at The Hague are intact. Its President and Registrar continue their duties from Geneva. A budget for 1944 was duly alimented and a budget for 1945 has been adopted. The twelve judges of the Court who continue in office, as "hold-overs" from expired terms pending new nominations and elections, are available for the discharge of their duties.

Appropriately, the current survey contains also an appraisal of the future of the Court as an institution, which may best be reported here in Judge Hudson's own phrasing:

> The primary need of the world is for a court endowed with the prestige which will enable it to serve for the adjudication of disputes between States according to law. Such a court exists under the Statute of 1920. It is not an hypothesis, it is a fact. It is not perfect, it might be improved in this or that detail, and a larger role could be carved out for it. Yet effort along these lines should be subordinated to the over-powering necessity of placing the Court which exists in a position to resume its activity and to carry on its functions under the hundreds of international instruments which are now in force and to which additions may be made as States are willing to make them.

The present article is noteworthy for its analysis of, and in some respects its reply to, the controversial Report of the Informal Allied Committee, which is published in full, for the first time in America, in the invaluable documentary section of the same issue of the magazine. The whole issue is in fact devoted largely to expert exposition of various angles of the Dumbarton Oaks Proposals, with an editorial comment by Judge Hudson on the approach to them. Lawyers and others will do well to have this issue and keep it handy, for reference during the San Francisco Conference. (Address: The American Journal of International Law, 700 Jackson Place, N.W., Washington, D.C.; price for a single copy: $1.50).

CRIMINAL LAW – *"Collateral Review of Convictions in Federal Courts":* The increasing use of the writ of habeas corpus in the Federal Courts, for obtaining a collateral review of convictions in criminal cases, is ably treated in the January issue of the *Boston University Law Review* (Vol. XXV—No. 1; pages 26-55), by Alexander Holtzoff, Special Assistant to the Attorney General of the United States. The early limitations on the use of the writ for this purpose is shown to have been greatly expanded by decisions of the Supreme Court and other Federal Courts, following the passage of the Act of February 5, 1867 (14 Stat. 385) which radically modified habeas corpus procedure. (Address: The Boston University Law Review, 11 Ashburton Place, Boston, Massachusetts; price for a single copy: 70 cents).

CRIMINAL LAW – *"Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder":* What effect has the expiration or repeal of a criminal statute or regulation on a criminal prosecution for violation thereunder? This problem, with particular reference to the common law and the Federal and Oregon rules, is discussed in detail by Elmer M. Million, Assistant Professor in the College of Law at the University of Idaho, in the December issue of the *Oregon Law Review* (Vol. XXIV—No. 1; pages 25-53). It is indicated that, at common law, criminal liability did not survive the expiration or repeal of a criminal statute, in the absence of a saving clause; but that, under the Federal Saving Statute of 1871, and under the Oregon statutory rule, the result is exactly the opposite, except in the case of a constitutional amendment, when a saving clause in the amendment is prerequisite to survival (Address: Oregon Law Review, Eugene, Ore.; price for a single copy. 75 cents).

DECEDENTS' ESTATES – *Protection of Interests of Prospective Heirs and Legatees—"Torts to Expectancies in Decedents' Estates":* Dean Alvin E. Evans of the University of Kentucky College of Law is the author of an informative exposition in the *University of Pennsylvania Law Review* for December (Vol. 93—No. 2; pages 187-205). Pointing out much progress in the protection of prospective advantages deriving from contractual relations, he discusses the questions as to protection from interference with expectations by reason of the following: Procuring or forging of a will or preventing the execution of a will, causing the revocation or alteration of a will or preventing such revocation or alteration, suppression of wills; and obtaining by fraud an *inter vivos* conveyance of the testator's property. He indicates that the possible remedies which may be invoked by the disappointed heir or legatee are: Resisting or setting aside probate, impressing a constructive trust, and an action for damages. He concludes that the protection of such expectancies is still in a twilight zone, and emphasizes the importance of making prompt protest in the probate court whenever possible. Documentation with the pertinent authorities adds usefulness to the article. (Address: University of Pennsylvania Law Review, 34th and Chestnut Streets, Philadelphia 4, Pa.; price for a single copy: 75 cents).

EVIDENCE—*"Some Observations Upon the Opinion Rule and Expert Testimony":* In the February issue of the *Texas Law Review* (Vol. 13—No. 2; pages 109-136), Dean Charles T. McCormick of that Law School expresses the view that "the prevailing practice in respect to the admission of the opinions of non-expert witnesses may best be described, not as a rule excluding opinions but, as a rule of preference". He declares that the more concrete description is preferred to the more abstract, and that "The classic difference between so-called 'fact' and 'opinion' is no

difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable line to mark the boundary".

As the opinions of "experts", Dean McCormick finds two chief points of weakness. The first of these, as he sees it, is the choice of experts by the diligent, who naturally will try to find the best witness rather than the best scientist. He suggests that the remedy for this weakness is in use of the trial judge's common law power to call experts, which has been implemented by statutes in a number of states and in the Uniform Expert Testimony Act. The second weakness he presents as that "the adversary method of eliciting scientific testimony, frequently upon hypothetical questions based on a partisan choice of data, is ill-suited to the dispassionate presentation of technical data, and results too often in overemphasizing conflicts in scientific opinions which a jury is incapable of resolving". The learned author is of the view that the hypothetical question by which an opinion is elicited from an expert is a failure in practice and obstructs the administration of justice. (Address: Texas Law Review, Austin, Texas; price for a single copy: $1.00).

HUSBAND AND WIFE—*Collection of Alimony—"Ex-wife's Power to Attach Spendthrift Trust Income to Enforce a Decree for Alimony":* The problem of the rights and duties of divorced or judicially separated spouses may become increasingly important in the next few years of adjustment to peace-time living. Of interest in this connection is a note, titled as above, in the December issue of the *University of Pennsylvania Law Review* (Vol. 93—No. 2; pages 207-214). The note brings together the cases, and suggests that some confusion has come into the law by reason of the tendency of the courts to apply the term "wife" indiscriminately to a spouse who has been divorced absolutely and to one who has obtained a judicial separation. (Address: University of Pennsylvania Law Review, 34th and Chestnut Streets, Philadelphia 4, Pa.; price for a single copy: 75 cents).

LEGISLATION—*"The Future of Small Loan Legislation"*: Professor George G. Bogert, of the University of Chicago Law School, contributes the above-entitled discussion in the December issue of *The University of Chicago Law Review* (Vol. 12—No. 1; pages 1-25). He tells first of the numerous legislative attempts to give special treatment to the small loan and protection to the small borrower. A brief review of Illinois experience is followed by exposition of "the questions (1) whether the states should regulate some or all small loan business in any way; (2) whether, if there is to be some regulation, it shall include the fixing of the rates to be charged; and (3) if rate regulation is to occur, in what form shall the rate be prescribed." (Address: The University of Chicago Law Review, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: 75 cents).

OIL AND GAS—*"Current Problems in the Law of Implied Covenants in Oil and Gas Leases":* Various regulations by administrative bodies as a result of the wartime production and conservation of oil and gas are seen as possibly having the effect of preventing a lessee from fully complying with the duties of a reasonably prudent operator as those duties are commonly interpreted. Maurice H. Merrill, Professor of Law at the University of Oklahoma, writing in the February issue of the *Texas Law Review* (Vol. XXIII—No. 2; pages 137-149), deals with this situation as one of the current problems in the law of implied covenants in oil and gas leases. He recognizes that a regulation of this nature might well be unconstitutional, insofar as it purports to permit the lessee to breach his implied covenant obligations without compensation to the lessor, and that in any event it is the duty of the lessee to represent the royalty interest and attempt to secure the proper formulation or modification of any administrative regulation that tends to prevent the efficient development and exploitation of the property. He suggests that clauses in leases designed to exempt the operator from misfeasance or nonfeasance committed under the sanction of government rule should be accorded judicial enforcement only upon a clear showing that the agreements "waiving" the implied covenants actually are the result of informed agreement between the parties. (Address: Texas Law Review, Austin, Texas; price for a single copy: $1.00).

REAL PROPERTY—*Eminent Domain — "Measure of Compensation for Extinguishment of Easement by Condemnation":* Professor Ralph W. Aigler of the University of Michigan, writing in the January issue of the *Wisconsin Law Review* (Vol. 1945—No. 1; pages 5-40), distinguishes between decision and *dicta* to discover the proper standards of compensation for the taking under the power of eminent domain of legal easements (both appurtenant and in gross), equitable easements, and covenants running with the land. The condemnation of legal easements, Professor Aigler states, is universally regarded as compensable. For the taking of an appurtenant easement, an award for the decrease in the market value of the dominant land resulting from the loss of the easement and not for the difference in the value of the servient land free of the easement and as subject to it, constitutes, in his opinion, just compensation. On the question of whether or not equitable easements and covenants running with the land are compensable interests, Professor Aigler has contributed both a comprehensive examination of the authorities and a discussion of the principles involved. (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents).

TAXATION—*"The Family Trust —Its Income Tax Fate":* In the January issue of the *Dickinson Law Re-*

view (Vol. XLIX—No. 2; pages 33-55), Edward N. Polisher, of the Philadelphia Bar, depicts the vicissitudes which the so-called "family trust" has undergone, in its encounters with the income tax law. While the trust mechanism has served useful and legitimate purposes more often than not, the author points out that the "very qualities which induced its widespread use were employed at times to convert the trust into a device for avoidance of obligations, including taxation". Recent developments are exemplified by summaries of the cases. Declining to distill an all-inclusive rule, Mr. Polisher states usefully the principles which he thinks may fairly be drawn. (Address: Dickinson Law Review, Carlisle, Pennsylvania; price for a single copy: 75 cents).

TAXATION—*"Some Tax Effects of Cancellation of Indebtedness":* Does the cancellation of an indebtedness owed to a taxpayer constitute taxable gross income or is it a gift? This is the basic question treated by Joseph B. Lynch in the November issue of the *Fordham Law Review* (Vol. XIII—No. 2; pages 145-174). The general rule, as laid down in the case of *United States* v. *Kirby*, 284 U. S. 1 (1931), is that an increase in net assets resulting from the cancellation of indebtedness constitutes gross income. The author traces the more recent changes in various phases of the question, and not only outlines the trend of judicial development but also points up the general ineptness of past legislative attempts to deal with the problems. He suggests revision of the present provisions of the Internal Revenue Code with an incorporation therein of the cognate provisions of the Chandler Act, to achieve greater uniformity and closer coordination. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00).

TRUSTS—*"The Legal Propriety of Investment by American Fiduciaries in the Shares of Boston-Type Open-End Investment Trusts":* In the January issue of the *Boston University Law Review* (Vol. XXV—No. 1; pages 1-25), Mayo Adams Shattuck, President of the Massachusetts Bar Association, appraises the future prospects for the qualification of shares of well-seasoned investment companies and investment trusts for inclusion in American trust portfolios. Recent developments in the field of trust administration seem to him to point toward increasing acceptance of shares of this type of security as proper and suitable fiduciary investments; and he sees no formidable legal objections to the purchase of such securities by fiduciaries, at least in states where the "legal list" rule is not applicable. (Address: The Boston University Law Review, 11 Ashburton Place, Boston, Massachusetts; price for a single copy: 70 cents).

WILLS—*"How New York Restricts Gifts for Masses":* An article by Kenneth R. O'Brien, a priest in the Archdiocese of Los Angeles, California, and Daniel E. O'Brien of the California Bar, in the November issue of the *Fordham Law Review* (Vol. XIII—No. 2; pages 175-193), discusses testamentary gifts for Masses. Tracing the question from the common law doctrine of *cy pres*, the article deals primarily with the New York law on the subject and the manner in which the courts have construed Section 17 of the New York Decedent Estate Law. The authors conclude that the great weight of authority in the United States, including New York, favors the view that gifts for Masses are always for a charitable use and, as charitable trusts, are not included in the rule against perpetuities. The authors believe that the New York statute, as amended, more closely approaches the natural law than do similar statutes in other jurisdictions. (Address: Fordham Law Review, 302 Broadway, New York 7, N. Y.; price for a single copy: $1.00).

A RESPONSIBILITY OF THE BAR

(Continued from page 171)

There will be no retreats to normalcy and isolation this time. Patient and helpful collaboration must be our role for the future. Never again will we be willing to live in a world like the one of five years ago that was moving in reverse toward the slavery, misery and oppression of the Dark Ages.

But out of all this misery and suffering we have learned again that there are causes for which men will gladly fight and die. For many of them who fought have died, and others of necessity must join them before the holocaust is ended.

Ours did not die for wider lands, nor for better pay, or new markets, or raw materials, or for old age pensions, nor for materialism in any of its multitudinous forms. Fundamentally we know, and I believe they knew, and their loved ones must understand, that they died in the cause of justice and right, to free the enslaved, to redress the wronged, to level the fortress of tyranny and oppression, to rebuild the temple of justice—in short, to insure the blessings of liberty not only to our posterity, but to those of less favored lands. Freedom for others was the pillar of cloud by day and the pillar of fire by night that guided them even to the last mile. Their sacrifice is incapable of measurement, but its high and holy character will diffuse itself irresistibly through the hearts and minds of those who remain, and succeeding generations cannot help but be the better. Their lives were acted out, not upon some narrow stage, but in the broad arena where nations battled for the freedom of the world, and their actions were the very stuff of which history is made. Upon them rested the hopes of civilization, and they did not cringe or falter but boldly marched to their objective.

Let those whose task it is to carry the easy banners of peace see to it that they do their task as well.

"BOOKS FOR LAWYERS"

(Continued from page 189)

Even when it was desirable to delegate legislative power, Congress would be able to require its exercise in accordance with its own policy. Control would be retained by expanding the use of provisional legislation which empowers the Executive to propose actions a given period in advance of their effective date, during which Congress retains the right to veto them.[5] An efficient Congressional staff would analyze and report on the proposals, and Executives would be afforded an opportunity during the Question Period to explain, defend and advocate them.

Each of these proposals merits intensive examination. They are singularly timely, for in its closing days the Seventy-eighth Congress by concurrent resolution set up a joint committee headed by Senator Francis H. Maloney, since lamentably deceased, "to make a full and complete study of the organization and operation of the Congress" and to recommend improvements.

President Simmons[6] of our own Association has expressed the hope that "the lawyers of our country will give serious thought to the work of the new committee . . . and will give it the benefit of their ideas as to the scope and extent of that reorganization." That suggestion might well be implemented by setting up a special committee of the Association to make a thorough study of the subject. The debate in the House of Delegates on a report by such a committee would doubtless prove to be not only stimulating but of constructive and lasting value.

WALTER P. ARMSTRONG
Memphis, Tennessee.

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835. *By Charles Grove Haines. California: University of California Press. (1944). Pages xiii, 679 ($6).*

A title sometimes conceals, rather than reveals, the subject matter of a book. But Professor Haines clearly discloses his central thesis in his caption. His argument is that constitutional law is not law, but politics; that the Justices of the Supreme Court from 1789 to 1835 did not constitute a "legal tribunal" but "an important political agency" exercising tremendous influence in government—all summed up in the author's conclusion that "the Constitution is essentially a political document" interpreted by master politicians who talk legally but decide politically. While there is a time-check in his title which limits his thesis to the formative era of 1789-1835, Professor Haines would probably argue that these generalizations extend down to our present day.

It is clear that Professor Haines is not writing in the tradition of the "mechanical school" which places faith in principles and precedents, nor does he wholly agree with those who would maintain, in the words of Cardozo, that "the law is stable and yet it cannot stand still." His book is written in the pattern of the legal realists who explain "law" in terms of its non-legal aspects and subordinate the doctrine of *stare decisis*. He sets forth at some length the European doctrine of "free legal decisions", which evolves law out of "insight, feeling and social perspective", and finds that American legal realism and the European cult of free decisions have many things in common.

Whether he is merely reporting or applauding these liberal trends in the judicial process is not clear, but on either assumption it is believed that he has oversold the wares of free judicial decision and legal realism, at least in the field of Anglo-American *common* law. Emotion, the "hunch" process, and even the gastronomical approach, are admittedly factors of the judicial process, for justices after all are human beings with all the frailties of humankind. But judges generally rise above the level of insight, feelings and abdominal reactions. The art of judging calls for thinking as well as "hunching," research as well as subconscious motivation, detached judgment as well as the impact of external stimuli. The horoscope and the fluoroscope are unlikely to supplant the American Digest system in the equipment of our law libraries.

But when the learned writer moves into the limited field of constitutional law and proposes to consider the extra-legal aspects of the relatively "few decisions" of the Supreme Court which have "political significance," he walks on firmer ground. The flexibility of constitutional law finds considerable support in the early writings of the Justices themselves. Chief Justice Marshall, the author's arch-example of partisan and personalized judging, warned that "we must never forget that it is a Constitution we are expounding." Justice Story pointed out that our organic law "unavoidably deals in general language" and Justice William Johnson—the forgotten dissenter of Marshall's Court, who recently has been rediscovered by legal historians—once said: "The science of government . . . consists of little more than the exercise of a sound discretion applied to the exigencies of the state as they arise." Even today, the picture of the Supreme Court is not—to put it moderately—wholly static ("Portrait of the New Supreme Court" (1944). 13 *Fordham Law Review* 1-16).

Professor Haines has amassed a formidable amount of materials in defense of his main contention that the Supreme Court has been a political rather than a legal tribunal. His book will serve as a valuable source book, along with the works of Warren and Beveridge, for all scholars who are interested in the early years of the Supreme Court. It is hoped that he may be able to continue his politico-jural appraisal of the Supreme Court down to the present day.

However, there are a few passages in the book which call for a *caveat* against overstatement and a

5. It was an Act of this kind that authorized the Supreme Court to promulgate the Federal Rules of Civil Procedure. U. S. Code Title 28, § 723b, 723c.

6. Reorganization of the Federal Government. By David A. Simmons. 31 A.B.A.J. 63-66.

failure to note the limitations in his theory that the Supreme Court is "one of the foremost political agencies" of our government. Political power, we know, begets more political power, so that we might expect to find the super-politicians of the Supreme Court looking around for more and more opportunity to exercise jural politics. Yet the history of the Supreme Court is strangely one of restraint and moderation. The justices have generally refused to decide "political questions", on the ground, among others, that such questions are not of a justiciable nature. As noted by Warren, this voluntary withdrawal from political questions does not evidence an agency "grasping for power" (2 Warren, *The Supreme Court in United States History* (1932) 186-195, 722). Professor Haines duly notes that the Court voluntarily refused to exercise jurisdiction over political matters, but argues that it would not be difficult or indefensible for the justices to assume such jurisdiction. Strangely enough the author at this point seems to be criticizing the Supreme Court because it is not *more* political! (Pages 12-13).

More difficult to fit into his main argument of a politically-minded court is the uniform and consistent refusal of the Supreme Court to give "advisory opinions." The possibilities of expanding political influence by the simple expedient of advisory opinions are of course limitless. But the repeated refusals of the Supreme Court from the time of Chief Justice Jay to Chief Justice Stone hardly fit into the pattern of political domination by the Court as developed in this book. Professor Haines endeavors to explain the reasons for Chief Justice Jay's refusal to give legal advice to President Washington in 1793. He poses the "difficult and comprehensive nature of the questions propounded" by the President. If the questions had been simpler and the Chief Justice less insistent upon the Olympian aloofness of the Court, the learned author suggests that the practice of giving advisory opinions might have been adopted. (Pages 143-148). This assumption is gratuitous and undocumented, and is moreover inconsistent with the fact that Chief Justice Jay in 1790 had refused to accede to Secretary Hamilton's request for an opinion on certain resolutions passed by the House of Representatives of Virginia. Thus in 1790 Chief Justice Jay evidenced a dislike for advisory opinions which he merely emphasized three years later. It is also important to recall that the attempts in the Constitutional Convention to empower the Supreme Court to give advisory opinions or to veto legislation were unsuccessful. (Comment (1936) 5 *Fordham Law Review*, 94-114).

But apart from the reasons prompting the Supreme Court to withhold advice to the President or the Congress, the significant fact remains that the Supreme Court has continued this refusal down to our own time and has thereby rejected political power easily available. Indeed, Professor Haines argues that there are urgent reasons for the giving of advisory opinions by the Court, thus recognizing again that the Supreme Court has not exhausted the field of political power.

It is believed that other self-imposed restrictions and limitations disclose a firm purpose by the Supreme Court to avoid decisions of constitutional "politics" or "law" in many cases where such jurisdiction could be exercised. It suffices to mention that some of these restrictive rules are well summarized in the concurring opinion of Brandeis, J., in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341-356 (1935).

One mechanical defect in the book is the absence of an adequate index opening up the wealth of collected materials. For example, Alexander Hamilton, who opposes the Jeffersonian viewpoint on judicial matters and whose name appears frequently throughout the book, is not mentioned in the index. Justice Oliver Wendell Holmes, the leader of the realist school in modern times, is also without mention. The omission of these names is unfortunate because Professor Haines' thesis has emphasized the personal and individualistic aspects of the judicial process.

But the minor faults should not obscure the earlier appraisal of this book. Professor Haines has done a masterful job of research in a highly controversial field. While he has naturally used the materials of earlier writers, there is a freshness of approach that makes his book interesting and informative reading. It is difficult to be completely detached in the evaluation of the Supreme Court of a century ago or even of our own day. This admission is humbly made by Professor Haines in his Introduction and applies not only to authors but also to reviewers.

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ACQUISITION OF PROPERTY FOR WAR PURPOSES. December, 1944. *Government Printing Office. Preface by Norman M. Littell, lately Assistant Attorney General. Pages xli, 158, with index and bibliography. (75 cents).*

This is a compact and apparently complete manual, representing the culmination of studies by the Lands Division of the Department of Justice. Present sources of governmental authority to acquire property, real and personal, for such purposes, the methods of acquisition, the bases of compensation and damages, set forth with statutes and extensive footnotes, should be a useful guide for Government officials and lawyers, in a field where there appears to have been considerable confusion. The ordinary practitioner will find references also to such matters as the taxing and treaty-making powers, the purchase and acceptance of gifts of property, the status of alien enemy property, and military government and martial law, which are helpful not only in connection with the present emergency but in future problems that are sure to arise.

ROGER D. SWAIM

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MENTAL ABNORMALITY AND CRIME: ENGLISH STUDIES IN CRIMINAL SCIENCE, VOL. II. *Edited by L. Radzinowicz and J. W. C. Turner. Preface by Professor P. H. Winfield. (December, 1944). London and New York: The Macmillan Company. Pages xxiv, 316. $3.75.*

THE MODERN PRISON SYSTEM OF INDIA: ENGLISH STUDIES IN CRIMINAL SCIENCE, VOL. III. *By Lieutenant-Colonel F. A. Barker. Foreword by Lord Halley. Preface by Professor P. H. Winfield. (December, 1944). London and New York: The Macmillan Company. Pages xvi, 139. $2.50.*

Notable scientific studies of situations and conduct which are subject to law and legal procedures continue to come from English sources. As of December 18, there were issued Volumes II and III in the series promoted by the Department of Criminal Science in the Faculty of Law in the University of Cambridge. Both were printed in Great Britain. Lack of space prevents the full review which they well deserve.

The high percentage of "mental" cases disclosed by official investigations in modern communities, the largely unexplored relationships between mental abnormality and criminal activity, and the realization that an offender who is not expertly investigated and remedially dealt with is "a most expensive luxury", have prompted this series of studies, to which Volume II is an outstanding contribution through its analysis of the different types of variation from normality (of which "insanity" is generically but one), their significance as to criminal responsibility, and the classifications of their treatment. Each chapter was written by one of the most noted of British neurologists, psychiatrists, or penologists, having special qualifications as to the particular subject.

The brochure as to the modern prison system of India is attractive, not only because of "the complexity and color of Indian life and institutions", but also for its bearing on "that composite polity which has become the British Commonwealth of Nations." The Criminal Code of India regulates, under a uniform body of legal principles, "the lives of more millions of people than any other system which the world has known." The first-hand picture given of the progress in criminal law and procedure, as well as in penal administration, does not leave room for belief that the British in India have been laggard or lacking in humanity.

WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT. *By Sheldon Glueck. December, 1944. New York: Alfred A. Knopf. Pages 250, xii. ($3.00).* A comprehensive and scholarly study of the means of carrying out an important objective of Allied policy has been written by the Professor of Criminal Law and Criminology at Harvard University. Currently it is the most discussed work on the subject, as to which the scope and mechanics of the United Nations' policy have not yet been made public.

Professor Glueck's conclusions are that the "war criminals" must be tried and punished, and that they "must be tried by the military and civil courts, and under the laws, of each of the injured states, with certain exceptional and large-scale cases to be prosecuted in an international criminal court to be set up by the United Nations and to apply the common (unwritten) as well as the conventional (written) law of nations."

THE IDEA OF PROGRESS IN AMERICA: 1815-1860—*By Arthur Alphonse Ekirch, Jr. 1944. New York: Columbia University Press. $3.50. 305 pages with index.*

This volume is one of the notable series of studies in history, economics and public law, which have been edited by the Faculty of Political Science of Columbia University. It is complementary to J. B. Bury's *The Idea of Progress: An Inquiry Into Its Origin and Growth* (first British edition, 1920; New York, 1932) and especially to Charles A. and Mary Beard's *The American Spirit: A Study of the Idea of Civilization in the United States* (New York, 1942).

Ekirch's work reflects documented research rather than deduction. He accepts as starting-point the "Beard philosophy" of the motivation of events by economics and the self-interest of contending groups. He supports his assumptions from quotations from all manner of casual declarations, including Fourth of July orations, covering the period from the ending of the second war with England down to the opening of the war between the states. He concludes that the dogma and determination for "progress" were the intellectual force animating much of the American life, and were functional to the American economy and way of life.

Naturally, in a study dominated by so materialistic a philosophy, the author is oblivious to the distinctive American development of law and courts, to the concept of civil liberties vouchsafed by constitutional guaranties, and to the observance of organic limitations on governmental powers, all of which were inherent in the American idea and achievement of progress during the period covered. The author's concept of what constitutes "progress" is that which has led to many untoward events in years long subsequent.

Recent Publications

FREEDOM IS MORE THAN A WORD, by Marshall Field. 1945. Chicago: University of Chicago Press. Pages xvii, 189. Price, $2.50.

THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE, Vol. I—The Agrarian Life of the Middle Ages, edited by J. H. Clapham & Eileen Power. 1944. Cambridge: At the University Press; New York: The MacMillan Company. Pages 650. Price $7.00.

Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY, JUNIOR BAR CONFERENCE

Although the Council of the Junior Bar Conference has not held it's annual mid-year meeting and may not hold the meeting at all because of government restrictions on travel, all members of the Council, state chairmen, and chairmen of national committees of the Conference were requested to submit mid-year reports to the officers as usual. All of those reports have not been received, but a sufficient number have arrived to provide us with a general conception of the nature and extent of junior bar activities which are being conducted by the Conference throughout the nation. The reports received clearly indicate that the Conference work is progressing satisfactorily throughout the country despite the man-power shortage and other difficulties created by the war.

The work being performed by certain of the Conference's national committees has been discussed in earlier issues of the JOURNAL. Another committee which now reports activity is the Committee in Aid of the Small Litigant. That committee is divided into two sub-committees. One sub-committee is engaged in conducting a survey of the justice of the peace system in the various states while the other sub-committee is concerned with conducting small loan surveys in certain states. The sub-committee on the justice of the peace survey has collected much information relative to the matter and such information is being made available to Professor Edson R. Sunderland of the University of Michigan who is compiling the material for publication in the form of a report. This report should be of much value to the legal profession and to the public. The sub-committee on small loan surveys has conducted a survey of small loan conditions in Oklahoma, Kansas, and South Carolina, and is conducting a similar survey in Alabama. The results of the Oklahoma and Kansas surveys have been published and have been generally well received. The South Carolina report has not been completed. The first draft of the Alabama report is being prepared at this date. K. Thomas Everngam of Denton, Maryland, is chairman of the Committee, and Robert S. Hunter, Quincy, Illinois, is vice chairman in charge of the sub-committee on the justice of the peace survey and John A. Johnson, Oklahoma City, Oklahoma, is vice chairman in charge of the small loan surveys.

The first issue (January 1943) of "The Young Lawyer" has received much favorable comment from members of the Conference, older members of the American Bar Association, and from others. It is a publication of the Junior Bar Conference and contains a short history of the Conference, brief articles on bar leaders, an explanation of the Conference's activities, and other articles. The next issue is being prepared for the press and will contain a review of the activities of state and local junior bar groups as well as other information of value and interest. Sidney S. Sachs, Washington, D. C., is the editor of the "The Young Lawyer."

Howard N. Bullock of Columbus, Ohio, has been appointed to serve as state chairman in Ohio for the Conference according to Charles S. Rhyne, Washington, D. C., National Chairman of the Conference.

The Younger Members Committee of the Chicago Bar Association was a sponsor of the Cook County Traffic Court Conference which was held recently, is conducting an income survey of younger lawyers in the Chicago area, is supporting legislation concerned with chemical tests for intoxication, preparing articles for the *Chicago Bar Record*, participating in work on refresher courses for returning lawyer-servicemen, is working on a program to publicize the Chicago Bar Association's choices for the bench, and is engaged in interesting prospective members in the Chicago Bar Association. John M. O'Connor, Jr. is chairman of the Younger Members Committee of the Chicago Bar Association.

The Committee on Relations with Law Students is giving much consideration to the nature of the work to be performed by it.

This committe is concerned with ways and means of assisting students in various law schools and in encouraging them to become interested in bar association work. The war necessarily retarded its activity but with the committee definitely planning its work, much should be accomplished in the future.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakley, Dallas, Texas, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Section Recommendations for Statutory Changes

The officers of the Tax Section have recently sent to the Section membership a convenient printed pamphlet containing the recommendations of the Association for changes in the federal taxing statutes. An accompanying letter by Messrs. Phillips, Sutherland and Vincent states:

> . . . Generally, such recommendations do not enter the debatable field of objects and rates of taxation, but deal with the simplification or clarification of the statute, the resolving of conflicting principles, or improvements for procedure or administration. These recommendations will be submitted at the next Congressional hearings on taxes. Your active support of these recommendations with your congressmen and senators will be helpful.
>
> Within the past three years, Congress has adopted at least seventeen recommendations of the Association and of this Section for changes in the taxing statutes. The latest was a recommendation for an extension of the time within which pension and profit-sharing plans might be qualified under the Internal Revenue Code. Some of these recommendations had the support of other organizations. The Treasury Department, the Bureau of Internal Revenue and the Joint Committee on Internal Revenue Taxation and its Staff have been most cooperative and sympathetic with the objects of the Section.
>
> The pamphlet also lists the names and addresses of the officers of the Section and of the chairmen and members of the several committees. Members of the Section are earnestly requested to submit to the Committee Chairman all constructive suggestions which they may have for improvement in the tax law or its administration, whether such suggestions deal with the law, the regulations or administrative procedure.
>
> It is our hope that shortly we shall be able to send you a summary of other activities, particularly in the field of the administration of the taxing statutes.

The pamphlet lists the following nineteen subjects, with the texts of the proposed amendments, and comments on the nature of the problem and the results sought to be accomplished:

1. Jurisdiction of Tax Court to require a clear statement of the grounds for a deficiency in taxes.
2. Prior deduction of excess depreciation.
3. Net operating loss and unused excess profits credit carry-over adjustment.
4. Statute of limitations where taxpayer relies on Commissioner's ruling and files no return.
5. Amendments of claims for refund in cases pending before Tax Court.
6. Personal holding company—exemption where consolidated return filed.
7. Repeal of declared value excess profits tax.
8. Repeal of Section 734 of the Internal Revenue Code.
9. Invested capital, preferred stock distributions in first sixty days of taxable year.
10. Invested capital, transferee in reorganization.
11. Simplification of rate schedules for estate tax and credits for gift and state inheritance taxes.
12. Credit for gift tax against estate tax.
13. Estate and gift taxes—liens.
14. Estate and gift taxes—limitation period for transferees.
15. Tax Court decisions—scope of judicial review.
16. Tax Court jurisdiction of manufacturers' excise taxes.
17. Manufacturers' excise taxes—sales price.
18. Retroactive changes in the tax law.
19. Internal Revenue Administrative Code.

Council Meeting

The midwinter meeting of the Council of the Section of Taxation was held in Washington on February 17. The primary purpose of the meeting was to hear reports on the questions being considered by the various committees of the Section. The following are some of the points covered:

Federal Estate and Gift Taxes: (1) powers of appointment held by employees under pension and profit-sharing trusts; (2) statute of limitations for gift tax transferees; (3) estate tax and gift tax liens; (4) retroactive application of *Field* and *Stinson* decisions.

Pension and Profit-Sharing Trusts: (1) income tax upon insurance premiums; (2) limitation upon stockholders' benefits; (3) Commissioner's discretion in approving trusts.

Federal Judicial and Administrative Procedure: After a discussion of the proposed Tax Court of Appeals, the Committee was directed to submit a report at the earliest opportunity, so that a vote on the proposal could be taken by mail.

Simplification of Federal Tax Laws: Interest on corporate tax deficiencies without offsetting interest for overpayment of a related tax.

Federal Income Taxes: (1) deductions for expenses incurred in the preparation of tax returns and in tax controversies; (2) conditioning consents on Form 870 upon final acceptance of the stated liability; (3) commissions to salesmen after contract renegotiation; (4) compensation to employees in military service.

If members have any suggestions with respect to these or other issues, please communicate with the Secretary of the Tax Section, Mr. Robert C. Vincent, 15 Broad St., New York 5, N. Y.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term in 1945:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

The states of Indiana and Nevada will each elect a State Delegate to fill vacancies expiring at the adjournment of the 1946 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1945 must be filed with the Board of Elections not later than April 13, 1945. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be timely, nominating petitions must actually be received at the Headquarters of the Association before the close of business at 5:00 P.M. on April 13, 1945.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group.)

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Nominating petitions will be published in the next succeeding issue of the American Bar Association Journal which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the Journal. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Board of Elections
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Laurent K. Varnum

Nominating Petitions

Connecticut

To the Board of Elections:

The undersigned hereby nominate Charles M. Lyman, of New Haven, for the office of State Delegate for and from the State of Connecticut, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Joseph F. Berry, William E. C. Bulkeley, James W. Carpenter, James S. Coburn, Cyril Coleman, Kimberly Cheney, Roger W. Davis, Edward M. Day, William W. Fisher, Robert L. Halloran, Thomas P. Harvey, Charles S. House, Lawrence A. Howard, John B. Lee, Barclay Robinson, Lucius F. Robinson, Jr., and Allan K. Smith of Hartford;

Messrs. Albert H. Barclay, Edward J. Brennan, Clarence W. Bronson, Arthur W. Chambers, Walton E. Cronan, Ellsworth B. Foote, Samuel A. Galpin, Frank R. Goldman, F. C. Hesselmeyer, Richard Hooker, Jr., Bernard P. Kopkind, George M. Peck, Samuel H. Platcow, David M. Reilly, Edward L. Reynolds, Cleaveland J. Rice, Max H. Schwartz and John R. Thim of New Haven.

Illinois

To the Board of Elections:

The undersigned hereby nominate Tappan Gregory, of Chicago, for the office of State Delegate for and from the State of Illinois, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Arnold Alexander, Leo J. Bartoline, John D. Black, Harry E. Boe, Wm. C. Boyden, Warren B. Buckley, J. F. Dammann, Philip R. Davis, Q. P. Dorschel, R. Gregory Durham, George W. Gordon, Lloyd D. Heth, Allen E. Hoban, William L. Hunter, E. G. Ince, Walter H. Jacobs, Herbert M. Lautmann, Glen A. Lloyd, L. Duncan Lloyd, Eldon Martin, Thomas L. Marshall, John R. Nicholson, Frank T. O'Brien, Paul O'Donnell, T. A. Reynolds, Carl E. Rose, Louis Rosenfeld,

Ralph M. Shaw, Fredric H. Stafford, Oscar D. Stern, Silas H. Strawn and Benjamin Wham of Chicago;

Messrs. John M. Elliott, J. T. Hunter, R. J. Kavanagh, E. D. McLaughlin, Hiram E. Todd and O. P. Westervelt of Peoria;

Messrs. Clifford M. Blunk, Paul W. Gordon, Gray Herndon, Alonzo Hoff, Charles B. Stephens and Robert A. Stephens, Jr., of Springfield;

Messrs. A. F. Beaubien, John L. Boyles, Clarence W. Diver, Albert L. Hall, Herman C. Litchfield and Eugene M. Runyard of Waukegan.

Iowa

To the Board of Elections:

The undersigned hereby nominate Frederic M. Miller of Des Moines, for the office of State Delegate for and from the State of Iowa, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Justin W. Albright, W. J. Barngrover, O. N. Elliott, T. M. Ingersoll, B. T. Perrine, John D. Randall, A. H. Sargent, V. C. Shuttleworth, H. Y. Simmons, and H. E. Spangler of Cedar Rapids;

Mr. Charles F. Wennerstrum of Chariton;

Mr. Raymond A. Smith of Council Bluffs;

Messrs. Robt. J. Bannister, John F. Bierman, Joseph Brody, Gregory Brunk, Clyde B. Charlton, R. W. Colflesh, L. Call Dickinson, Gordon L. Elliott, Ehlers English, Frederick F. Faville, C. Glenn Garten, Ben J. Gibson, Thos. J. Guthrie, Allan A. Herrick, Gibson C. Holladay, Alden B. Howland, Herschel G. Langdon, F. W. Lehmann, Jr., Wm. F. McFarlin, Alexander M. Miller, Irving W. Myers, Ray Nyemaster, Thomas B. Roberts, W. B. Sloan, James M. Stewart, W. C. Strock and Harlan J. Thoma of Des Moines;

Mr. Roscoe Thoma of Fairfield;

Mr. Alan Loth of Fort Dodge; and

Mr. Oscar Hale of Wapello.

Maine

To the Board of Elections:

The undersigned hereby nominate Clement F. Robinson, of Portland for the office of State Delegate for and from the State of Maine, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Neal A. Donahue, Harry Manser, John G. Marshall, and George C. Webber of Auburn;

Messrs. James H. Hudson, Ralph W. Leighton, Herbert E. Locke and Ernest L. McLean of Augusta;

Mr. George F. Eaton of Bangor;

Messrs. David O. Rodick and Serenus B. Rodick of Bar Harbor;

Mr. Edward W. Bridgham of Bath;

Mr. Louis B. Lausier of Biddeford;

Mr. James B. Perkins of Boothbay Harbor;

Miss Jean Lois Bangs of Brunswick;

Mr. Harold H. Murchie of Calais;

Mr. Owen Brewster of Dexter;

Mr. George B. Barnes of Houlton;

Messrs. Benjamin L. Berman, John D. Clifford, Jr., W. H. Clifford and Fred H. Lancaster of Lewiston;

Mr. Albert J. Stearns of Norway;

Messrs. Edward W. Atwood, Jacob H. Berman, Clark D. Chapman, Philip G. Clifford, Herbert J. Connell, Frank I. Cowan, John F. Dana, Wadleigh B. Drummond, Horace Hildreth, Charles L. Hutchinson, William M. Ingraham, William S. Linnell, William B. Nulty, Leonard A. Pierce, Fred C. Scribner, Jr., Guy H. Sturgis, Sidney St. F. Thaxter and Nathan W. Thompson of Portland;

Mr. Ralph T. Parker of Rumford;

Mr. John P. Deering of Saco;

Mr. Hiram Willard of Sanford;

Mr. Edward F. Merrill of Skohegan;

Mr. Walter L. Gray of South Paris;

Messrs. Cyril N. Joly, Carroll N. Perkins and Thomas N. Weeks of Waterville; and

Mr. Cyrus N. Blanchard of Wilton.

Washington

To the Board of Elections:

The undersigned hereby nominate Wm. G. McLaren, of Seattle for the office of State Delegate for and from the State of Washington, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. William M. Allen, Tom M. Alderson, G. Wright Arnold, R. M. Burgunder, J. N. Davis, Edward O. Dobrin, Henry Elliott, Jr., Ford Q. Elvidge, DeWolfe Emory, Edw. S. Franklin, Cassius E. Gates, Gordon Gose, Robert Graham, Tracy

E. Griffin, Clinton H. Hartson, Frank E. Holman, Drayton F. Howe, Ivan L. Hyland, A. R. Kehoe, W. Byron Lane, F. A. LeSourd, Philip D. Macbride, Lucien F. Marion, Roger J. Meakim, Thomas L. Morrow, Charles H. Paul, Bernard Reiter, Otto B. Rupp, Alfred J. Schweppe, Carl J. Smith, Matthew Stafford, John N. Sylvester, Edward R. Taylor, Daniel B. Trefethen, Jr., and George W. Williams of Seattle;

Messrs. Philip S. Brooke, W. S. Gilbert and Lawrence R. Hamblen of Spokane;

Messrs. A. E. Blair, L. R. Bonneville, A. O. Burmeister, Reuben C. Carlson, Hilton B. Gardner, Cyrus Happy, Owen P. Hughes, Wayne W. Keyes, F. D. Metzger, Hugo Metzler, Wallace Mount and Bartlett Rummell of Tacoma.

Letters to the Editors

To the Editors:

The enclosed article was found under a pile of rubble in a shell-smashed farmhouse in which I was seeking shelter from one of those Adriatic gales which have been making life miserable on this front. —

Although it was written after the fall of another dictator more than a century ago, I think that it brings a timely message to our profession, particularly to the lawyer at home who is unhappy with the thought that his daily routine has no bearing on the war effort.

Peculiarly, I heard the same idea expressed, though less rhetorically, by a number of Englishmen engaged in a campfire discussion the other night. Indeed, there must be some deep, underlying reason why the men of this army are, today, under the most miserable conditions, fighting with the same fervor which carried them through the crisis of El Alemein, the heat of the African desert and the fury of Cassino. And, of course, the same applies to our American soldier whose morale has never been questioned despite his ingrained hate of regimentation and this business of killing.

ARTHUR A. BURCH
1st Lt., A.U.S.

With the British
Eighth Army near Ravenna

Editor's note: With this letter came four pages from a French book or magazine in which had been printed the celebrated "Assize Sermon" delivered by the Reverend Sydney Smith about a century ago.

The sermon begins with this sentence: "Equal rights to unequal possessions, equal justice to the rich and poor; this is what men come out to fight for, and to defend."

To the Editors:

I wish to express my appreciation to you and the Association for sending to me the Bar Association JOURNAL. Being out of touch with the law as I have been for the last 30 months, and being fearful of the tremendous difficulties of filling the gap upon returning to civilian life, I find this magazine of inestimable value in keeping me in touch with what is going on in the profession.

I might also add that it is being avidly read by the other two attorneys aboard who are not as yet members of the Association. I feel that I might be able to do a bit of missionary work in this field.

My every best wish for your continued success.

J. E. COLLINS
Lieutenant, USNR

At Sea

To the Editors:

I should like to compliment you on the "Practising Lawyer's Guide to the Current Law Magazines". In my judgment it is one of the most valuable features of the JOURNAL.

L. B. MANN

Chicago

Classified

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BOOKS

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"Oh, she's OLD! Almost thirty!"

At twenty, thirty seems ancient.

At thirty, forty is distant middle age.

At forty, well, it'll be a long time before you're fifty.

The point is that ten years *ahead* always seems like a long time. Yet, actually it passes "before you know it" . . . and you find yourself face to face with problems, opportunities, needs, that once seemed very far in the future.

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In ten years—*only* ten years—those bonds will bring you back $4 for every $3 you put into them today.

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